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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938

No. 436

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FANSTEEL METALLURGICAL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR FANSTEEL METALLURGICAL CORPORATION.

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Opinions Below.

The opinion, findings of fact, conclusions of law and order of the National Labor Relations Board (R. 1947-1971) are reported in 5 N. L. R. B. 930. The opinion of the Circuit Court of Appeals, the concurring opinion and the dissenting opinion (R. 1980-2000) are reported in 98 F. (2d) 375.

Jurisdiction.

The order of the Circuit Court of Appeals was entered on July 22, 1938. The petition for certiorari filed by the Board on October 22, 1938, was granted by this Court on November 21, 1938. The jurisdiction of this Court rests

upon Section 240(a) of the Judicial Code, 28 U. S. C. A. §347, and Sections 10(e) and (f) of the National Labor Relations Act.

STATEMENT OF THE CASE.

The proceedings before the National Labor Relations Board (herein called the "Board") grew out of the forcible seizure of Respondent's plant in a so-called "sit-down" strike. Upon the refusal of the men to surrender possession, they were promptly discharged for the seizure and retention of the buildings (R. 1781, 1766). An injunctional order to vacate the premises was openly defied and on two occasions the Sheriff's efforts to enforce the court writs were repulsed with violence. The forcible retention of the plant continued from February 17 to February 26, 1937, when the Sheriff effected an eviction through the use of tear gas (R. 1782, 1783).

The sit-down strikers were members of Lodge 66, which was organized in the summer of 1936 under the leadership of the Steel Workers Organizing Committee (R. 184-5). A vigorous membership drive then ensued, and on September 10, 1936 a committee of Lodge 66 presented to the Plant Superintendent a contract containing provisions for the regulation of working conditions, a closed shop and check-off system, and recognition of the union (R. 1633). After reading the agreement, Anselm, the Plant Superintendent, objected to the closed shop and check-off provisions (R. 212, 261). Committee members testified that he also took exception to the recognition of an outside union (R. 204). At the same time, acting on his own initiative and without authority from the company's officers, Anselm suggested that the men consider an employee representation plan but gave no assurance that the plan would be acceptable to the company (R. 218). Anselm thereupon obtained and presented to the President petitions of employees endorsing the

plan, and was immediately informed, "We don't want to do anything about that. Let them do as they please over in the shop." The petitions were thereupon physically destroyed by Anselm and nothing further was done to propose or promote the E. R. P. (R. 1352, 1951).[1]

Under the mistaken impression that an appointment had been arranged, the committee again called on Anselm on September 21st, this time accompanied by its organizer. Anselm insisted that no appointment had been made and thereupon the committee apologized for the intrusion and withdrew (R. 256, 285-6, 317).

Charges that the Respondent had failed to bargain collectively on September 10th were then filed with the Board (R. 23-4). These charges, heard during the present proceeding, were dismissed. The Board's decision holds that neither on September 10th nor September 21st did Lodge 66 represent a majority of the employees in the appropriate bargaining unit (R. 1956, 1982).[2]

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[1] This is what is characterized in the Board's brief as "a vigorous campaign on the part of Respondent to obtain" an inside union (Bd. Br. p. 30).

[2] The Board found that just prior to the September Meetings, the Respondent had employed an undercover agent to engage in espionage against Lodge 66. The undisputed evidence shows that out of a long list of reports dealing with general plant recommendations, only four even mentioned union activities (R. 341). The man in question was discharged December 1, 1936, almost three months prior to the plant seizure, and in no way participated in any of the matters in controversy before the Board (R. 360-1, 365, 379). It further appears from the undisputed evidence, including the Board's own stipulation, that not a single employee was discharged or disciplined for union membership or activity either as a result of the alleged espionage or otherwise (R. 1593, 361). Throughout the period, officers and leaders of Lodge 66 participated in pay raises without discrimination (R. 365).

No further meetings were held or requested until February 17, 1937, the day of the plant seizure (R. 287). In the meantime, Lodge 66 directed a systematic campaign of coercion and intimidation against Respondent's employees which extended into their very homes (R. 1765). Threats of physical violence and large fines or initiation fees ranging from twenty-five to one hundred and fifty dollars for each employee were freely employed (R. 1765).[3] In at least one department deliberate, provocative slowdowns were organized (R. 1311-3).

In two meetings held on February 17, 1937, with a large committee of Lodge 66, the Plant Superintendent denied a request that he confer with their outside organizer (R. 257-8, 298). The National Labor Relations Act was discussed during the meetings. The constitutionality of its application to the Respondent was questioned; Anselm called attention to the fact that the Supreme Court had not yet passed upon its validity (R. 258). No satisfactory conclusion was reached. The committee thereupon withdrew and held a brief, secret meeting in the chemical building, where it was determined to engage in a sit-down strike (R. 298-9).

Within a half hour following the conclusion of the second conference and without any notice or warning to the Respondent, about one hundred men forcibly seized Buildings 3 and 5, key buildings of the plant (R. 1762, *et seq.*, 1780). Foreman and other employees were compelled to leave with the warning that they had better go "peace-

[3] These facts necessarily influenced the Respondent's opinion, embodied in a public statement, that a large number of the men who remained within the buildings were compelled to do so against their will. In the same statement, the Respondent announced that it would give favorable consideration to applications for reemployment by men so coerced (R. 1336).

ably," and the buildings were then locked and barricaded from the inside (R. 1130). The seizure effected a complete stoppage in the operation of the entire plant (R. 1762, *et seq.*, 1780).

About four hours after the plant seizure, the Plant Superintendent and counsel for the Company, accompanied by two police officials, sought entrance into the buildings and demanded surrender of possession. Upon the refusal of the men to leave, they announced, upon orders of the President, that all of the men remaining in the buildings were discharged for the violent seizure and retention of the premises (R. 1780-1). All of the parties stipulated before the Trial Examiner that there had been a blanket discharge of all the men then in occupation of the buildings and that at the time of the discharge their number, their identity and their union affiliations, if any, with eight or ten exceptions, were totally unknown to the Respondent or anyone connected with its management (R. 1781).[4]

The morning following the discharge, Respondent filed a complaint for an injunction in the Circuit Court of Lake County, Illinois. After full hearing, at which counsel for Lodge 66 and the individual defendants appeared and were heard, the Circuit Court of Lake County entered a finding that the seizure of the buildings and their continued occupancy was illegal (R. 1781). A mandatory injunction thereupon issued directing that the buildings be vacated and possession be restored to the Respondent (R. 1780-1, 1763-4). Upon being served with the injunction by the Sheriff, the men refused to comply, denied the

[4] While the Board's brief now reverses the position adopted in the petition for certiorari and admits the discharge, it does so only as a procedural matter. Accordingly, in order that there may be no misapprehension, the entire record, including the stipulation of facts, is set out *infra* p. 20n.

Sheriff admittance into the buildings and announced their intention to "hold" the premises (R. 1782, 1767-8). The refusal to comply with the order was reported to the Circuit Court of Lake County in a verified petition for a rule to show cause. The Circuit Court of Lake County thereupon issued a writ of attachment directing the Sheriff to arrest the men remaining within the buildings and bring them before the Court to show cause why they should not be held in contempt.

On the morning of February 19th, the Sheriff, accompanied by about one hundred deputies, attempted to enforce the writ of attachment. Copies of the writ were served upon the men in both buildings, and again the men refused to come out (R. 1782, 1767-8). Thereupon, the deputies attempted to force an entrance into Building 5. With axes and battering rams they succeeded in breaking down one door only to be met by pressure streams of fire extinguishing chemicals fed from huge tanks and directed by the men on the inside (R. 1807, 1769, 1089, 1124, 1133). At the same time the men on the upper floors of both buildings began bombarding the Sheriff and his deputies with large quantities of sulphuric acid and heavy steel and iron missiles, including pipes, bolts, nuts, reamers, wire reels and sharp end tools (R. 1769-70, 1782, 1092-5, 1113, 1122-3).[5]

The sulphuric acid was particularly terrifying as it was poured from windows and hurled in quart bottle containers at the Sheriff's men below (R. 1815, 1090, 1092). Certain of the sit-down strikers, terrified by the imminence of per-

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[5] Pictures of the type of missiles employed appear as Respondent's Exhibits 10, 11, 12, 26, 27 and 29 (R. 1809, 1811, 1813, 1833, 1835, 1837, 1841). A picture of the quart bottles of acid collected at a "throwing station" appears as Respondent's Exhibit 13 (R. 1815).

manent injury to the deputies, protested the use of the sulphuric acid but to no avail (R. 1173, 1176-7).

A number of deputies were burned by the sulphuric acid and other deputies were injured by the heavy flying missiles (R. 1120-1, 1771, 1840, 1841). To protect his men, the Sheriff withdrew and employed tear gas in an effort to dislodge the occupants of the plant. That served only to increase the intensity of the acid and missile barrage and the Sheriff and his deputies were compelled to withdraw without executing the writs (R. 1770).

The sit-down strikers continued their occupancy of the buildings until the morning of February 26th. During this interval they were amply supplied from the outside with food, clothing, beds, bedding, stoves, radios, home equipment and supplies (R. 1784-5, 1821).[6] Leadership in furnishing such supplies was provided by fourteen of the men ordered reinstated and others with full knowledge of the injunction and for the express purpose of enabling the sit-down strikers to defy the Courts and law enforcement authorities and hold their fort (R. 465, 1784-5).

On the morning of February 26th, the Sheriff and his deputies again attempted to enter the buildings. A more violent counterpart of the first resistance then ensued. Tools, reels and other heavy missiles, intermingled with quart bottles of sulphuric acid, were again hurled from the windows at the law enforcement officers (R. 1771,

[6] The volume of the supplies is indicated by a photograph of but one of several van loads of equipment found in the plant after the men had been ousted (R. 1821, 1101). The equipment and supplies were brought in through windows, the doors remaining barricaded. The large menacing crowds on the outside made impossible interference by the Sheriff (R. 1773).

1115). It was stipulated that the Sheriff was then compelled to use tear and emetic gas in order to evict the occupants and restore possession of the buildings to the Respondent (R. 1783).

Sixty-six of the men ordered reinstated were admittedly participants in the violent seizure and retention of the plant and had full knowledge of the injunction. The writ of injunction and writ of attachment had been read to the men through open windows, a large number of copies of the writs had been passed into the buildings, and twice daily there were delivered to both buildings Chicago and Waukegan papers prominently displaying accounts of the occupation of the plant, the injunction and the unsuccessful efforts of the Sheriff toward enforcement (R. 1782-3, 1767-9). It was stipulated that fourteen other men ordered reinstated deliberately participated in the sit-down strike as aiders and abetters; and that these, having full knowledge of the injunction, procured and delivered the required food, equipment and supplies. The occupants of the buildings were thereby enabled to retain their unlawful possession (R. 465, 1784-5).

Thirty-seven of the men who participated in the seizure of the plant were tried and convicted of contempt by the Circuit Court of Lake County and were fined and sentenced to jail. Twenty-four received $100.00 fines and 10-day sentences, eleven received $150.00 fines and 120-day sentences, and two received $300.00 fines and 180-day sentences. Two who had not been employed by the Respondent but had aided and abetted in the plant retention also received fines and jail sentences. The hearings with respect to the balance of the men were continued by the Court upon its own motion (R. 1738-61). A full hearing of the merits of the case then ensued and a final decree embodying full findings of fact was thereupon entered

without objection by counsel for the defendants, and no appeal has ever been prosecuted therefrom (R. 1762, 1984).

An appeal from the contempt sentences resulted in an affirmance by the Appellate Court of Illinois for the Second District (295 Ill. App. 323). The Supreme Court of Illinois denied leave to appeal on October 17, 1938 (295 Ill. App. xxiii).

A large and direct loss was inflicted upon the Respondent by the men participating in the plant seizure and in the violent resistance to the Sheriff. Most of the windows and much of the sash had been broken to obtain air for combatting gas and to provide openings for the missiles thrown at the Sheriff's men (R. 1091, 1179, 1823-7). Other parts of the building interiors were damaged. Further physical destruction included the loss and damage of numerous tools and parts, many of which had been hurled through the windows, large quantities of sulphuric acid, 50,000 valuable contact points and other inventory materials dropped from windows upon the deputies or damaged within the buildings, two furnaces which were permitted to cool rapidly and burn out, general building damage occasioned by foamite and other chemicals in the fire extinguishers, a large Niagara shear ruined by foamite sprays, and other physical injuries occasioned by the use of the buildings for living quarters (R. 1095, 1099, 1123, 1180, 1817-28).[7] Machinery rusted and was otherwise dam-

[7] The attitude of certain of the men engaged in the property destruction is exemplified by the following: Chudy openly threatened, "If they don't leave us alone, we are going to start tearing the machines down and throw them on the deputies" (R. 1158). Another deliberately threw a jar of tantalum contact points out of the window, shouting, "Here goes a thousand dollars worth of rare metals" (R. 1123). In this connection it is interesting to note that the entire subject of property destruction is dismissed in the Board's decision with the casual statement that there had been no "sabotage" (R. 1967).

aged by exposure and lack of care. The President of the Respondent, whose testimony was uncontradicted, computed its direct loss to aggregate $62,000.00 (R. 1181-2).

In announcing the reopening of the plant after ten days of repair and rehabilitation work, the President of the Respondent issued the following public statement on February 26, 1938:

> "All of the men who participated in the sit-down strike were discharged by the company. It has been the company's consistent belief that more than half of the eighty men who participated in the seizure of the plants were compelled to do so through coercion and intimidation. Applications for reemployment from such men will receive favorable consideration.
>
> "We cannot condone the defiance of the courts or the resistance with violence to the enforcement of the law. For the men who participated in such unlawful activities, there can be no place in our plant" (R. 1336).

Twelve of the men who had managed to escape or otherwise leave the buildings before the eviction, and twenty-three who had remained throughout the entire period filed applications for reemployment and were hired (R. 1772, 1784, 1985).

Reemployment was affirmatively refused to certain of the men and in no case did it extend to men who were thereafter sentenced for contempt by the Circuit Court of Lake County (R. 1741, 1784, 1985). Many old employees returned and empty places were filled by new applicants. Sixty-one men and women who returned to work were members of Lodge 66, and all of them, including officers and members of the bargaining committee, were reinstated

without any condition as to union membership or activity (R. 1343).[8]

With the resumption of operations came plant changes in the interest of economy. Numerous jobs were completely abolished and others were materially altered, effecting substantial savings. The entire section manufacturing standard dies was abolished (R. 1192). The maintenance department was eliminated and a small repair crew of two men and two helpers substituted (R. 1190). Women were employed for the entire cutting department, replacing both sit-down strikers and non-strikers (R. 1214, 1234). Piece rates which had prevailed in certain departments were abolished and the entire plant placed on an hourly basis (R. 1189, 1260). Certain of the jobs eliminated had been previously occupied by persons ordered reinstated by the Board (R. 1829, 1831, 1291, 1298-9).[9]

After the reopening of the plant there was general talk among the workers about the organization of a labor union. It was a subject of general conversation, some favoring

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[8] Throughout its brief and as a major premise for a substantial portion of its argument, the Board insists that reemployment and reinstatement was made conditional upon surrender of union membership and collective bargaining rights (Bd. Br. pp. 17, 50, 51, 75). No record citation is given for this unwarranted statement and there is not a scintilla of evidence nor any finding of the Board to support it. The specific, uncontradicted testimony is that no limitation respecting union membership or collective bargaining activity was imposed as a condition of reinstatement or reemployment (R. 1216, 1282-3). The Board's own witnesses related reinstatement offers in which no conditions were mentioned (R. 451, 452-3, 460-1, 542).

[9] For the convenience of the Court, an analysis and classification of all persons named in the complaint, reflecting the record evidence as to each, has been prepared as an appendix to this brief.

an American Federation of Labor local and others an independent union (R. 1020-21). About the middle of April, 1937, a self-appointed committee consisting of both old and new employees called a general meeting of the workers who decided overwhelmingly, by secret ballot, to establish an independent union. Rare Metal Workers of America Local No. 1 was thereby created (R. 932-3, 905, 1008, 1011). Supervisory employees were excluded from membership and did not participate either in the organization of the union or in the conduct or management of its affairs (R. 1003, 1020-2). Every witness admitted that the management exerted no influence or coercion directly or indirectly to encourage membership in the organization. All who testified, whether they joined or refused to join, admitted that they acted of their own free will and were never threatened or disciplined or even approached by any member of the management on the subject of the independent union (R. 956, 982, 985-6, 990).

Because the respondent had permitted the new organization to hold its two initial meetings in a vacant company building, and to mimeograph notices upon its machines and post them upon its bulletin boards, and to place ballot boxes in building lobbies for an election during noon hour, the Board held that the respondent had supported, dominated and interfered with the organization (R. 1963-5).

The evidence showed that the organization and the committee had sought but had been refused the use of public halls in the community because feeling was running high and there was fear of violence (R. 970-79). The subsequent monthly meetings were held in a church of which employees were members and subsequently in halls paid for in each instance by the union out of dues collected from its membership (R. 1321, 1851, 1855).

All of the witnesses testified that the management had no hand whatever, directly or indirectly, in the conduct of the union affairs (R. 954, 920, 921, 955-7, 985, 989, 990, 1018, 1020).

The complaint issued by the Board three months after the termination of the sit-down strike was heard by a Trial Examiner. Both in the exceptions to the Intermediate Report of the Trial Examiner and in the petition for review by the Court, the denial of a fair hearing was charged. This rested upon the Board's discriminatory denial of subpoenas upon Respondent's formal and repeated requests. The record with respect to these matters appears fully in the Argument.

Upon the entry of the Board's order, Respondent filed a petition for review in the Circuit Court of Appeals for the Seventh Circuit. A cross-petition for enforcement was presented by the Board. Enforcement was denied and the Board's order was set aside by the Court (R. 2000). Judge Treanor dissented, holding, however, that the Board's order was invalid in so far as it required reinstatement of persons for whom there were no jobs or who were shown to be inefficient (R. 1998, 2000).

SUMMARY OF ARGUMENT.

I.

The Board is wholly without power to order the reinstatement of men discharged for good cause. The Board concedes that there was a *bona fide* discharge for ample cause—not as punishment for union membership or collective bargaining activity. The Act does not abridge the employer's right of discharge for cause. Under Section 10(c) of the Act, the Board's power to order reinstatement is limited to persons (1) who are "employees" and (2) whose reinstatement will effectuate the policies of the Act.

A. Section 2(3) of the Act defines "employee" to include individuals who cease work by reason of a labor dispute or an unfair labor practice. The Congressional intent is that workers shall not *lose* their employee status by striking. This section does not destroy the employer's right to discharge striking employees for cause, nor does it, conversely, confer upon striking employees immunity from discharge for cause.

B. Section 10(c) authorizes the Board to command "such affirmative action, including the reinstatement of employees, with or without back pay, as will effectuate the policies of this Act." Only employees may be ordered reinstated. In asserting the power to require reinstatement of non-employees, the Board treats the phrase "including the reinstatement of employees" as superfluous. The specific definition of the reinstatement power qualifies and limits the general grant.

C. The constitutional protection of the employer's right of discharge can be required to give way only to the extent that it collides with the employee's coequal right of self-organization. The right of self-organization does not embrace a license to seize the employer's plant. The lawless occupation of plants is not and could not constitutionally be safeguarded by the Act. Construed in the light of the restraints imposed by the Fifth Amendment, the Act clearly preserves the employer's right to discharge employees for cause, whether they be at work or on strike, and confers upon the Board no power to compel employment of former employees.

(Point I deals with section 2(b) of the Board's order, defended under Point II, A, 1 of the Board's brief.)

II.

A. The reinstatement of discharged employees guilty of the property destruction and lawlessness portrayed on this record cannot advance either the immediate objective of collective bargaining or the ultimate end of industrial peace. Spurning the legal remedies available under the Act, including the pending proceeding before the Board, the sit-down strikers took the law into their own hands. The Board charges the employer with full responsibility for that violence, vandalism and lawlessness thus undertaken as a means of self-redress. That is nothing more than an approval of lynch law. The deliberate lawlessness disqualified the participants as suitable employees. Respondent had ample grounds for its apprehension that their reemployment would engender plant demoralization and strife. Contrary to the Board's argument, no conditions as to union membership or collective bargaining activity were imposed upon any persons reemployed. Respondent

accepted applications for reemployment only from those believed to have been coerced and intimidated into remaining within the buildings. That action did not, as to the remaining men, either vitiate their valid discharge or qualify them as suitable employees. Their reinstatement cannot effectuate the policies of the Act.

(Point II, A deals with section 2(b) of the Board's order, defended under Point II, A, 2 of the Board's brief.)

B. The reinstatement of persons (1) whose jobs have been abolished, and (2) who are shown to have been inefficient, cannot effectuate the policies of the Act. The *bona fide* character of the internal reorganization and the inefficiency of the seven individuals in question are not denied in the Board's decision or findings. The Board dealt with these two groups by directing Respondent to reinstate all of the persons involved and then to carry out a new internal reorganization, discharging those for whom there were no jobs or who were inefficient. Ordering the reinstatement of such persons would be productive only of futile plant disorganization and constitutes an abuse of discretion.

(Point II, B deals with section 2(b) of the Board's order, defended under Point II, A, 3 of the Board's brief.)

C. The back-pay provision of the Board's order constitutes a penalty for seeking judicial review of the order. This is particularly true with respect to persons whose jobs have been abolished or who were shown to be inefficient. The Board's order recognizes that upon their reinstatement they may be immediately discharged.

(Point II, C deals with section 2(c) of the Board's order, defended under Point II, A, 4 of the Board's brief.)

III.

The Court properly held that the elimination from the rolls of the employees dismissed for cause had completely dissipated any majority that Lodge 66 might have enjoyed. The Board is without power to order the recognition of Lodge 66 as the exclusive bargaining agency, in the face of the fact that it no longer represents a majority.

The order to cease and desist from refusing to recognize Lodge 66 is not different from the affirmative command for recognition. Both are invalid in the absence of a present majority.

(Point III deals with section 1(c) and section 2(a) of the Board's order, defended under Points I, B and II, B of the Board's brief.)

IV.

The record is wholly barren of any evidence to sustain the finding of domination and interference respecting the Rare Metal Workers of America, Local No. 1, and there is no substantial evidence of support. The management had no part in the formation or conduct of the union. It exerted no influence or coercion to swell its rolls. Mere passivity or absence of hostility does not constitute such pressure or abuse of relation as to "corrupt or override" the will of employees. Further, disestablishment is an unwarranted remedy against an organization free from employer domination both in its conduct and structure.

(Point IV deals with section 1(b) and section 2(d) of the Board's order, defended under Point III of the Board's brief.)

V.

Not a single subpoena requested by the Respondent was granted before or during the eighteen-day hearing. Not a single subpoena desired by the Board's attorney was refused. This arbitrary and discriminatory refusal of subpoenas denied to the Respondent the fair hearing required by the Fifth Amendment. The records for which subpoenas *duces tecum* were requested were essential for adequate cross examination of the Board's witnesses, who testified orally on the same subjects. The prejudice permeates the entire record and the remedy of additional evidence provided by Section 10(e) of the Act is inadequate.

(Point V is in answer to Point IV of the Board's brief.)

ARGUMENT.

I.

The Board has no power to require reinstatement of the men discharged for good cause.

The decision of the Circuit Court of Appeals reversing the order of reinstatement of the sit-down strikers is predicated upon the grounds:

First, that the valid discharge for good cause terminated their status as employees; and

Second, that the Board is without statutory power to require the reinstatement of persons other than employees.

The Court said:

> "There seems to be no denial by the Board that there was ample cause for discharge. * * * Certainly it cannot be denied that an employer is warranted in discharging his employees, and severing that relationship, when they take and retain exclusive possession of his propetry against his will. They had a complete and adequate remedy, without cost to them at the hands of the Board, and by the use of which they would have lost nothing in time or wages, if their cause were just. The employer had no coordinate right in this respect * * *." (R. 1988)
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> * * *
>
> "What we hold is that there was just cause for discharge, it was exercised, and those who have not been reemployed are not employees and were not at the time of the finding and order of the Board." (R. 1989)

The *bona fide* discharge of the sit-down strikers cannot be open to question on this record. Nevertheless, for the first time in the Circuit Court of Appeals and then throughout the petition for certiorari, the Board insisted that the sit-down strikers had never actually been discharged and that the announcement was but a "tactical manoeuver." That challenge to the validity of the discharge is now abandoned in the Board's brief (p. 8n), but the Board nevertheless thereafter continues to characterize the discharge as "attempted," "tactical," "assumed," "purported" (Bd. Br. 13, 38, 40, 43n, 46). In view of the basic importance of the discharge to the Respondent's position and to avoid any misapprehension that the matter is merely procedural as the Board indicates, the record is detailed in the margin.[10] The discharge was conceded by all of the parties in the pleadings and the stipulation of facts and is established beyond question by all of the evidence. It is upon that substantive basis that the decision of the Circuit Court of Appeals rests.

The Court below properly treated in the same category as those discharged, the fourteen men who, with knowledge

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[10] The record on the subject of discharge is as follows:

(1) The amended charge, filed under oath by Lodge 66, alleges that:

> "The company did discharge 95 of its employees on February 17, 1937, for the reason that they were members of Lodge 66, Amalgamated Association of Iron, Steel and Tin Workers of North America, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection" (R. 33).

(2) Upon the basis of that charge, the Board issued its complaint, alleging that:

> "on February 17, 1937 . . . Respondent, acting by and through its officers and agents, caused to be discharged the following employees: [listing 92 persons] for the

of the injunction, had actively participated in the sit-down strike by providing the supplies and equipment necessary for the forcible retention of the premises and the violent resistance to the law enforcement officers. In exercise of its admitted power of discharge for good cause, the Respondent had declined to recognize these men as employees and to reinstate them, upon the express ground that they had participated in that common criminal undertaking (R. 75). Taking such position was the equivalent of exercising the Respondent's right of discharge. The Fourth Circuit Court of Appeals has expressly recognized that such power of discharge for participating in a criminal cause may be exercised without a formal announcement, saying:

> "The company had announced that it would not consider any worker as an employee who failed to return to work on June 13. In this broad position it was not justified, as we have already indicated; but on July

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reason of their membership in the union and that they engaged in concerted activities for the purpose of collective bargaining and for other mutual aid and protection" (R. 28).

(3) The answer admitted the discharge and raised as the sole issue the grounds for the discharge, stating:

> "Respondent further avers that the only persons named in Paragraph 8 of the complaint who were discharged by the Respondent were those who had participated in the violent seizure and unlawful retention of possession of Respondent's property, as hereinbefore set forth, and who were discharged, as hereinbefore set forth, solely by reason of such violence and unlawful conduct and for no other reason whatsoever" (R. 73).

(4) The stipulation of facts signed by Lodge 66 and the Board states that, upon the refusal of the men to surrender possession, the company informed the sit-down strikers "that every man remaining in the buildings was discharged

15, when the request of the Union for further negotiations was made, *it could lawfully decline to recognize as employees* confessed offenders who had previously broken the law. The right of an employer to discharge or *to refuse to reinstate a man* who has committed a crime which endangers the safety of his fellow workers or *the integrity of the plant* cannot be successfully challenged. The statute does not purport to destroy this right, or contemplate that an employer must continue to employ or to treat as employees men who have engaged in unlawful conduct of this character. Nor would such an interpretation effectuate the policies of an act designed to remove the sources of industrial strife by encouraging the friendly ad-

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for the violent seizure and retention of the buildings" (R. 1781). The stipulation continues:

> "At the time of the discharge of the men in Buildings 3 and 5, their number and their identity and their union affiliations, if any, with 8 or 10 exceptions, was totally unknown to Mr. Aitchison, Mr. Anselm, Mr. Swiren, or any one connected with the management of the company, and the discharge was a blanket discharge of all the men then within the buildings" (R. 1781).

(5) The record further includes the final decree entered by the Circuit Court of Lake County in the proceeding to which Lodge 66 and substantially all of the individuals involved were parties. The decree makes the express finding that the sit-down strikers were "discharged from its employ for such unlawful and violent seizure of plaintiff's property and plants" (R. 1766).

(6) The fact of the discharge was repeated in the public statement of the Respondent and communications to Lodge 66 and was never challenged in any meeting with Lodge 66 committees (R. 1336, 1670, 1673, 483).

(7) Upon its record the Board held that Respondent's action was not a "discriminatory discharge" and dismissed that portion of the complaint (R. 1961).

justment of industrial disputes. Sections 1 and 10 (c) of the Act, 29 U.S.C.A. §§ 151, 160 (c)." (Italics supplied.) *Standard Lime & Stone Co.* v. *National Labor Relations Board,* 97 F. (2d) 531, 535, 536.

The sole source of the Board's power to order reinstatement is Section 10(c) of the Act, authorizing the Board to require an employer

> "to take such affirmative action, including reinstatement of *employees* with or without back pay, as will effectuate the policies of this Act." (Italics supplied.)

Under this statutory grant, the Board's power to order reinstatement is expressly limited to persons who are "employees" and whose reinstatement will effectuate the policies of the Act. The Court below held that upon their discharge for cause, the sit-down strikers ceased being employees and that the Board was powerless to order their reinstatement.

To parry the force of the discharge for cause, the Board argues, first, that Section 2(3) of the Act prohibits discharge of strikers for cause and confers a statutory status of "employees" for the purpose of reinstatement by the Board, and secondly, that under Section 10(c), the Board has authority to order reinstatement of persons who are not employees. Both contentions were urged below and rejected by the Court, the latter contention being denied in the dissenting (R. 1992) as well as the majority and concurring opinions. We shall now consider each separately.[11]

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[11] Under Point II we assume, for the sake of argument, that the Board had the *power* to order the reinstatement of discharged employees and consider whether their reinstatement would "effectuate the policies of this Act."

A. The statute does not destroy an employer's right to discharge employees, whether at work or on strike, for good cause.

The only provisions in the Act dealing with the employer's right of discharge are Section 8(3) prohibiting discrimination in tenure of employment for the purpose of encouraging or discouraging union membership and Section 8(1) barring interference with the exercise by the employees of the self-organization and collective bargaining rights guaranteed by the statute. Nowhere does the Act undertake to abridge or restrain the employer's right to discharge employees for cause.

The contention is urged in the Board's brief, however, that Section 2(3) of the Act preserves to strikers the statutory status of "employees" so long as they are on strike, and thereby prohibits their discharge for good cause. No exhaustive definition of the term "employee" appears in the Act. Section 2(3) states:

> "The term 'employee' shall include any employee, . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . ."

Congress thereby provided only that the status of employees shall not be *lost* by going on strike. The Senate Committee Report discloses that this provision was designed to recognize

> "the principle that men do not *lose* the right to be considered as employees for the purpose of this appeal merely by collectively refraining from work during the course of a labor controversy." (Italics supplied.) Report No. 573 of Senate Com. on Education and Labor, 74th Congress, 1st Sess., p. 6.

Similarly, the Circuit Court of Appeals for the Fourth Circuit stated in *Moorseville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61, 66:

"Congress desired in its definition of an employee to indicate that a worker does not cease to be an employee merely because he has lost or left his job in consequence of a current labor dispute."

Section 2(3) simply codifies the rapidly devolping judicial view that individuals going on strike do not forfeit their employee status. *Cf. Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134. The employment relationship may not be terminated merely for going on strike. The purpose of the statutory provision is to secure strikers in their status as employees—not to provide them with a cloak of immunity from discharge for proper cause. There is no Congressional intent that ceasing work in connection with a labor dispute shall confer a license for plant seizure, violence or other acts constituting legitimate grounds for discharge. The position of an employee ceasing work in connection with a labor dispute or as a consequence of an unfair labor practice is no different—no better and no worse—than that of his brother who remains at work. Both remain subject to discharge for proper cause—which, in the words of this Court, means "any reason other than union activity or agitation for collective bargaining."[12] *Associ-*

[12]Even the dissenting judge below recognized that the employee status of strikers may be terminated by employer action. He said in his opinion:

"In short, the National Labor Relations Act continues the employer-employee relationship for the purpose of enabling the Board to effectively prevent unfair labor practices, but does not protect striking employees from disadvantages which result from normal management action taken by the employer during the time the striking employees voluntarily refuse to work." (R. 1998).

How he reconciles this with his earlier conclusion that the employee status continues as a matter of law and cannot be terminated by the employer for good cause is not indicated.

ated Press v. *National Labor Relations Board*, 301 U. S. 103, 132.

Without specifically referring to Section 2(3) of the Act, this Court has twice emphasized and reaffirmed the employer's "undoubted right" to sever the employer-employee relationship for cause.

> "The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. * * * The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132.

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 46.

Neither reason nor the advancement of the legislative objectives warrants denial of an employer's right of discharge which the Board seeks to read into this section. Significantly enough, the Board's brief refers neither to the Congressional history and logical purpose of Section 2(3) nor to the views expressed by this Court. Instead, resort is had to a paradoxical argument. On the one

hand, the Board admits that an employer, even though he has committed an unfair labor practice, "is free to terminate all the normal incidents of the employee relationship for cause" (Bd. Br. pp. 43-44). On the other hand, and in the very same sentence, the Board arrogates to itself the power to restore the discharged employees to their former employment. What are these "normal incidents" of an employer relationship which the Board admits the employer's discharge may terminate? How do they differ from the rights and duties which would accrue upon the consummation of the Board's order of reinstatement? The Board ventures no explanation. Obviously, the Board has invented this self-contradictory theory for the sole purpose of paying lip service to the pronouncements of this Court without giving effect to their substance. If a discharge has any meaning at all, it terminates the employer's right to receive the employee's services and its obligation to pay him wages. Clearly an order of reinstatement by the Board would serve directly to override and nullify the employer's admitted right of discharge for cause.

No distinction is made in Section 2(3) between a strike resulting from an ordinary labor dispute and a strike caused by an unfair labor practice. Whatever the cause, the section makes the same provision that strikers shall enjoy the status of employees. If a prohibition against discharge for cause be read into the section, it applies with equal force to the employer innocent of any unfair labor practice as to the employer guilty of one. The test of the application of this section is whether the employees are on strike. Given effect logically, the Board's position must be that, even had the plant seizure in the instant case been undertaken in a wage and hour controversy wholly devoid of any unfair labor practices, this Respondent still would

be powerless to sever the employment relationship.[13] Particularly in view of the constitutional history of similar legislation, we submit that had Congress intended so extraordinary a restraint upon the normal right of discharge, it would have said so specifically and plainly in the statute. And the subject would have been at least mentioned in the Committee Reports or Congressional Debates.

The legitimate grounds which may arise for the discharge of an employee while on strike are many and varied. They may include physical incapacity; embezzlement discovered after the cessation of work; disclosure of secret processes or trade secrets to competitors; installation of automatic machinery; the arrest of the employee for burglary or other crimes; the dynamiting of the plant; and the forcible seizure and withholding of the plant. It is difficult to see how the legislative purposes could be advanced by enjoining the employer's constitutional right of discharge upon such grounds. Illegal conduct undertaken in aid of a strike or other union activity carries no legal sanction. ". . . No wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence." *In re Debs*, 158 U. S. 564, 598.

The principal authority relied on by the Board is *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138. In that case the men were discharged as punishment for going on strike. The employer's right to discharge striking employees for good cause was neither con-

[13] Wages and hours were the major issues in 29.4% of the sit-down strikes in 1937 and formed the major issue in 29.9% of all the strikes in that year. An additional 17% of the sit-down strikes involved grievances over working conditions other than union organization matters. 47 Monthly Labor Review, 361-2 (August, 1938).

sidered nor involved. Nor is it an answer to this fundamental distinction to say, as does the Board, that since the discharge occurred prior to the effective date of the Act, it was for good cause, no matter what its motivation. The most casual examination of the opinion discloses that insofar as the Court was concerned, it regarded the definition contained in Section 2(3) as controlling and applied it retroactively. The concurring opinion rests in part upon the judicial expressions, prior to the Act, that employees could not be discharged for going on strike. No consideration was given to the purpose of Section 2(3) or its effect upon a discharge for good cause. *Cf. National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 535 (supplementary opinion).

Directly in point and completely supporting the decision of the Court below is the opinion of the Fourth Circuit Court of Appeals in *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 97 F. (2d) 531. The Board had there directed the reinstatement of eight striking employees convicted of conspiracy to dynamite company property. In reversing the Board and sustaining the employer's right to discharge or refuse reinstatement to a striking employee guilty of illegal conduct, the Court expressly held that the "statute does not purport to destroy this right."

B. The Board's statutory power of reinstatement is limited to employees.

In further justification of its order, the Board asserts the power to require reinstatement of men admittedly no longer employees. Section 10(c) authorizes the Board to require "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The Board contends that it may

ignore the specific power to reinstate only employees and may draw upon the general grant for a widened and, indeed, unlimited reinstatement power.[14]

The phrase "including reinstatement of employees" and particularly the qualifying word "employees", are treated as wholly superfluous. Viewed differently, the authority to require reinstatement of employees is expanded to read "reinstatement of employees or *anyone else*".

Passing for a moment the constitutional implications inherent in that construction, it appears perfectly clear that the qualifying phrase "including reinstatement of employees" was inserted by way of limitation upon the Board's power. Reinstatement being so extraordinary a power, Congress thought it necessary to specify that authority and to define its limitations. Such has been the construction in decisions in two circuits, both unmentioned by the Board. Precisely the same point was raised in *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61, 66 (C. C. A. 4th). The Board there insisted that under the general grant of power in Section 10 (c), it could require reinstatement of strikers who had obtained equivalent employment and thereby had ceased to be employees. The order of reinstatement was set aside, the Court concluding that the Board's statutory power was restricted to the reinstatement of employees and did not extend to former employees.

Similarly, in *National Labor Relations Board* v. *Carlisle Lumber Company*, 99 F. (2d) 533, 537 (C. C. A. 9th),

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[14] In effect, the Board is contending for the power to veto an employer's discharge for cause and, since the Board's argument proceeds independently of Section 2(3), that veto power would extend to the proper discharge of working and striking employees alike.

the Court held the phrase in question to be one of qualification and limitation, saying:

> "The only apparent basis for a construction which would permit 'back pay' without reinstatement is by considering that such power arises from the Board's power to order a person guilty of unfair labor practices 'to take such affirmative action • • • as will effectuate the policies of this Act' independently of the words omitted from that quotation, which are: 'including reinstatement of employees with or without back pay'. I believe that since 'reinstatement' and 'back pay' were singled out for special treatment, it was intended that the general words were to be limited thereby."

There was complete unanimity among all three judges of the Court below on this point. The dissenting Judge conceded:

> "If the employer, in fact and in law, terminated the employer-employee relationship, it necessarily follows that that part of the order of the Board which required reinstatement was erroneous, since it is clear that the Board has power to reinstate only by ordering the employer to put back to work persons whose status, or relationship, of employee is preserved by the National Labor Relations Act."

This court has recognized that a specific addition in an "including" phrase may properly narrow and qualify a general grant. *United States* v. *Sweet*, 245 U. S. 563, 573. The Utah Enabling Act was there construed by this Court. Section 6 of that act provided that sections 2, 16, 32 and 36 in every township be set aside for the support of schools. Section 8 granted, for the establishment of the University of Utah,

"110,000 acres of land to be selected and located as provided in the foregoing section of this Act and including all saline land in said State." The issue presented was whether mineral lands passed under the general grant in Section 6. This Court held that the general grant did not convey title to mineral lands, because (a) there was an established policy to deal with mineral lands separately and (b), because the specific inclusion of saline lands after the general grant in Section 8 evidenced an intention to exclude mineral lands, although the general grant was broad enough to convey both. This Court said:

> "As to the 110,000 acres, there is an express inclusion of saline lands. This silence as to mineral lands, when contrasted with the special inclusion of saline lands, indicates that the former are not included." *Cf. Montello Salt Co.* v. *Utah,* 221 U. S. 452, 466.

Read as a whole, there is ample internal evidence within the Act itself to indicate that it deals only with the rights of employees. Nowhere in the House Committee report quoted at length on page 47 of the Board's Brief appears any intention by the Congress to confer upon the Board the broad and doubtful power it now seeks. The interpretation proposed by the Board conflicts with the authorities cited and does violence to the familiar principle of construction "that specific terms prevail over the general." *D. Ginsburg & Sons, Inc.* v. *Popkin,* 285 U. S. 204, 208; *Missouri* v. *Ross,* 299 U. S. 72, 76.

C. Construed as nullifying the right of discharge for cause, or empowering the Board to compel employment of non-employees, the Act would contravene the due process provision of the Fifth Amendment.

It is a cardinal principle of statutory construction that, in the absence of explicit and compelling language, a stat-

ute should be construed to avoid any substantial constitutional question. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298.

As formerly conceived, the due process clause of the Fifth Amendment protected the employer from any interference with or abridgment of his absolute right to select or discharge his employees. *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1. There then followed increasing recognition of the coequal constitutional right of employees to band together for purposes of collective bargaining and to select their own representatives. Legislative prohibition of the exercise by the employer of his right of discharge for the purpose of striking down the employees' right of organization—but only when so properly limited—has been sustained by this Court. *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515. In both cases this Court was careful to note that the legislation did not "interfere with the normal exercise of the right of the carrier to select its employees or to discharge them."

This normal right has been subsequently defined by this Court in construing the present Act, to mean a discharge "for any cause that seems to it [the employer] proper, save only as punishment for, or discouragement of, such activities as the Act declares permissible." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132. This view follows consistently the holding in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 349, that "it is arbitrary in the last degree to place upon [the employer] the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or have been for other reasons lawfully dismissed."

In both the *Associated Press* and the *Jones & Laughlin* cases, the reservation to the employer of the fundamental right of discharge for proper cause was emphasized by this Court to demonstrate that the Act was confined to constitutional limits. There was left the implication, necessarily required by the authorities, that an invasion of that right would contravene the due process provisions of the Fifth Amendment to the Constitution.

Admittedly the discharges in this case were for ample cause and in no respect as punishment for union membership or legitimate collective bargaining activity. The Board so held. The constitutional protection of the employer's right of discharge can be required to give way only to the extent that it collides with the employee's right of self-organization. *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548; *Virginian Railway Co.* v. *System Federation,* 300 U. S. 515; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. Beyond that point of collision, however, neither the Congress nor the Board may abridge the right of discharge. The right of self-organization does not embrace a license to seize the employer's plant. The lawless occupation of plants whether or not accompanying a strike is not and could not constitutionally be safeguarded by the Act. Construed in the light of the restraints imposed by the Fifth Amendment, the Act clearly preserves the employer's right to discharge employees for cause, whether they be at work or on strike, and confers upon the Board no power to compel employment of former employees.

II.

The reinstatement provisions of the Board's order would defeat rather than effectuate the policies of the Act.

Apart from the question of power to order reinstatement of discharged employees, the Board's order can be justified only if it serves to effectuate the policies of the Act. The statute was designed to promote industrial peace by encouraging collective bargaining and to provide an orderly process for enforcing the employees' right to self-organization.[15] The reinstatement of discharged employees guilty of the property destruction and lawlessness portrayed in this record cannot advance either the immediate objective of peaceful collective bargaining or the ultimate end of industrial peace. Nor does the protection of collective bargaining rights warrant an order of reinstatement of (1) persons whose jobs were completely abolished in a *bona fide* internal reorganization, complete evidence of which appears in this record, or (2) persons who participated in no union activity and were unwanted because of inefficiency demonstrated in the record.

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[15] The Senate Committee report states that "the first objective of the bill is to promote industrial peace" and analyzes Section 1 of the bill as follows: "Section 1. *Findings and Declaration of Policy.* This section states the dual objective of Congress to promote industrial peace and equality of bargaining power by encouraging the practice of collective bargaining and protecting the rights upon which it is based." (Report 573 of Senate Committee on Education and Labor, 74th Cong., 1st Sess., pp. 1, 6.) The House Committee amended "the declaration of policy in order to emphasize the intent of the bill to promote industrial peace." (Report 1147 of House Committee on Labor, 74th Cong., 1st Sess., p. 9.)

A. The reinstatement of the participants in the sit-down strike, with its accompanying violence and property destruction, would defeat the policies of the Act.

The Board treats reinstatement of employees as of the time of the commission of an unfair labor practice as though it were synonymous with "effectuating the policies of this Act." Section 10(c). The *status quo* is usually restored so that the parties may engage in collective bargaining as if no unfair labor practice had occurred. However, the Board has itself recognized that intervening illegal activities by striking employees may render reinstatement an inappropriate measure for effectuating the policies of the Act.

This proposition was conceded by Judge Treanor in the following words:

> "In my opinion Petitioner is right in its contention that the authority of the Board in respect to affirmative action is limited to such action as will effectuate the policies of the Act. Consequently, it does not follow that the Board must reinstate all, or any employees, even though it properly finds that the employer has engaged in unfair labor practices and must, therefore, issue a cease and desist order" (R. 1995).

In the case at bar, the intervening conduct of the men and their consequent discharge makes impossible a restoration in fact of the *status quo*. The Board cannot brush aside and wipe out the property destruction, lawlessness and discharge, and treat the situation as if these events had never occurred. Nor can the Board insist upon reinstatement simply because it believes that otherwise the Respondent's unfair labor practice would go unremedied. To require reinstatement in the face of the physical inabil-

ity to recreate the situation existing on February 17th is to provide punitive measures for which there is no statutory authority. *Cf. Consolidated Edison Company* v. *National Labor Relations Board,* Nos. 19 and 25, decided Dec. 5, 1938.

The Board's selection of reinstatement as the remedy necessary to effectuate the policies of the Act, notwithstanding the intervening occurrences, rests upon two findings: (a) that Respondent's refusal to bargain on February 17th was "the moving cause for the conduct of the employees" (R. 1966); and (b) that the sit-down strikers remained qualified employees because their conduct did not amount to "sabotage" (R. 1967). The first is a conclusion which, if accepted, approves and endorses self-help as a means of redress. The second is a finding of fact for which there is no basis in the record and the Court below so held.

1. *The Board's justification of the sit-down strike is an endorsement of self-help in lieu of the orderly procedure provided by the statute. It can only engender industrial strife and unrest.*

The Respondent is charged by the Board with responsibility for the illegal plant seizure, the open defiance of the Courts, the violent resistance to the law enforcement officers and the wanton destruction of property perpetrated by the sit-down strikers on the simple ground that they would never have occurred but for the denial of recognition.[16] And this to carry out the policies of legislation designed to provide an orderly, democratic substitute for brute force. The Board's conclusion amounts to an approval of lynch law.

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[16] Admittedly the plant was seized without notice, warning or explanation (R. 1780). The Trial Examiner tried

As a dialectic aid in illogically fastening upon the Respondent responsibility for the plant seizure and the subsequent violence, the Board conveniently adopts the "strike" label. It is self-evident that, when applied to a plant seizure by employees, even though coupled with a cessation of work, this is a gross misnomer and a vastly misleading understatement. The Board's repeated references to the entire affair simply as a "strike," serves first to veil and finally to obliterate the illegal aspects of the sit-down. Deluded by its own expedient misuse of words, the Board treats the men's conduct as a peaceful cessation of work flowing as a natural consequence from an unfair labor practice.[17]

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repeatedly, and always unsuccessfully, to elicit testimony that if recognition were accorded Lodge 66, the sit-down strikers were willing to vacate the premises (R. 1504, 1511-2). At no time did the sit-down strikers offer to vacate the premises on condition that recognition be accorded and collective bargaining commenced. Nor was that position ever adopted by Lodge 66 (R. 1512). At the September meetings a check-off system and closed shop had been demanded (R. 1982). Whether the sit-down strikers desired to impose these or any other demands as conditions precedent to voluntary return of possession does not appear from the record.

With respect to the mediation efforts during the occupancy of the premises, the company's position was that the retention of the plant had been adjudicated illegal and that until possession was restored there was nothing to discuss (R. 1334). The Board's argument that the Respondent was willing to meet the strikers "only as ex-employees, not as members of a union, or a committee of the union" (Bd. Br. pp. 37-38) cites hearsay evidence (R. 1507) which the Trial Examiner struck from the record (R. 1513-4).

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[17] For an excellent example of the sacrifice of substance to labels, see Board's brief, p. 61, 36.

The Board ignores, as did the men who seized the Respondent's plant, the legal, orderly remedies available under the law. The statutory right of collective bargaining may be enforced either by a proceeding before the Board or by a peaceful strike. The Circuit Court of Appeals pointed out:

> "They had a complete and adequate remedy, without cost to them, at the hands of the Board, by the use of which they would have lost nothing in time or wages, if their cause were just. The employer had no coordinate right in this respect" (R. 1988).

Indeed, the men had already filed a charge of refusal to bargain which was then pending before the Board—a charge which was ultimately not sustained (R. 23, 1956). Without waiting for the outcome of their legal proceeding, the men took the law into their own hands. They determined to settle the matter by force and violence "according to their own sense of right" without regard to either the federal or the state laws. It is shocking that a quasi-judicial agency should now contend that the commission by an employer of an act, which upon subsequent hearing may or may not be determined to constitute an unfair labor practice, charges the employer with full responsibility for whatever violence, vandalism and lawlessness any of the employees may thereafter elect to use as a means of self-redress.[18]

Self-help, with force, has no place in organized society. Neither high moral purpose nor integrity of objective can condone or justify the substitution of violence for the

[18] Had, for example, the plant seizure occurred on September 10th, when recognition was refused by the Respondent, we take it that the Board would not place responsibility for the employees' lawlessness upon the Respondent in view of the Board's determination that Lodge 66 lacked a majority on that date.

orderly processes of government. Before the turn of the century, when sit-down strikes were as yet unknown, this Court said:

> "A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defence of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence." *In re Debs,* 158 U. S. 564, 598.

Courts have employed equally sharp language to denounce and condemn self-help in the form of the sit-down strike. In *Apex Hosiery Co.* v. *Leader,* 90 F. (2d) 155, 157 (reversed on other grounds, 302 U. S. 656), the Court said:

> "*The so-called sit-down strike was in fact not a strike.* If there had been a strike or any labor trouble at the plaintiff's factory, the law provides a remedy for its peaceful settlement. The main purpose of the Wagner-Connery Labor Relations Act, 29 U. S. C. A. §§151-166, was to avoid industrial strife by providing an orderly process of settling controversies and causes of unrest. It defines and declares the rights of labor and provides machinery for enforcing them.
>
> "Underlying this case is the question of whether a few lawless individuals ignoring and contemning the

Wagner Act and in defiance of all law and order, and in ruthless disregard of the rights of others should be permitted, by assuming the name of a Union, to deprive all others of their means of livelihood and compel them to contribute of their earnings to self-styled leaders. A few 'sit-downers' are keeping 2,500 persons who were entirely satisfied with their positions from working and from earning an honest living for themselves and their families. *If an employer had denied to labor any of its rights, the Wagner Act provided an orderly way of calling him to account.* Instead of resorting to this act, the defendants by force and violence sought to compel the employer and its employees to do what the Wagner Act does not countenance and what the judgment of every true friend of labor and of all good men condemns as wrong both in policy and principle." (Italics supplied.)[19]

Not content with having undertaken an illegal sit-down strike,[20] the men defended its use with an open defiance of

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[19] Cf. *Peninsular & Occidental SS Co.* v. *National Labor Relations Board*, 98 F. (2d) 411, 415 (C. C. A. 4th), *cert. den.* Dec. 12, 1938; *The Oakmar*, 20 F. Supp. 650, 651.

[20] The statutes of the State of Illinois declare to be illegal the violence and appropriation of the Respondent's property established by the record. Applicable provisions are as follows:

"Intimidation.

"§376. *By combinations, etc.*

If any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger, or any unlawful means, any person from being employed by or obtaining employment from any such owner or possessor of property, on such terms as the parties concerned may agree upon, such persons so offending shall be fined not exceeding $500, or confined in the county jail not

the Courts and violent resistance to the law enforcement officers. So flagrant and deliberate was the lawlessness that the Chancellor imposed upon thirty-seven of the occupants of the buildings sentences ranging from a $100.00 fine and 10 days in jail to a $300.00 fine and 180 days in jail. Yet the Board orders the reemployment of all of these men.[21]

The Court below drew no distinction between the men occupying the plant and the fourteen aiders and abetters. All (save two) were not within the plant only because they were on the night shift and could not get through the gates (R. 674, 697-8, 708-9). These two had participated in the seizure but left the plant prior to the discharge announcement (R. 723, 748). The entire group came to

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exceeding six months. (Ill. Rev. Stat. State Bar Ass'n Div. 1937, Ch. 38, Sec. 376.)

§377. *Of workmen, etc.*

If any person shall, by threat, intimidation or unlawful interference, seek to prevent any other person from working or from obtaining work at any lawful business, or any terms that he may see fit, such person so offending shall be fined not exceeding $200. (Ill. Rev. Stat. Bar Ass'n Div. 1937, Ch. 38, Sec. 377.)

"§378. *Entering premises to intimidate.*

Whoever enters a coal bank, mine, shaft, manufactory, building or premises of another, with intent to commit any injury thereto, or by means of threats, intimidation, or riotous or other unlawful doings, to cause any person employed therein to leave his employment, shall be fined not exceeding $500, or confined in the county jail not exceeding six months, or both." (Ill. Rev. Stat. State Bar Ass'n Div. 1937, Ch. 38, Sec. 378.)

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[21] One of the men conceded on the witness stand that he did not expect compensation for the time he was serving in jail (R. 522).

the plant practically daily with supplies. Some were in the crowd outside the fence that injured and impeded the Sheriff's men in their efforts at eviction (R. 680, 712, 1773). Without the essential supplies and equipment which these men provided, with full knowledge of the injunction, no subsequent resort to force by the Sheriff would have been necessary and the sit-down strike would have terminated at once. These men were participants in the common undertaking just as directly as if they had occupied the buildings.[22]

The widespread acceptance of the sit-down strike as an industrial weapon of coercion demonstrates that the condonation of property seizures and destruction cannot encourage collective bargaining or promote industrial peace. The use, successfully and with impunity, of the sit-down strike in the General Motors plants pointed to a road quickly followed throughout the country. Indeed, even the consummation of a collective bargaining agreement did not discourage the use of the sit-down weapon on more than 30 occasions in the General Motors plants throughout the country. In these sit-downs alone, all subsequent to the collective bargaining agreement, 42,460 workers were involved, with a loss of 413,865 man-hours.[23] The union officials themselves have been unable to cope with the situation. Finally, that employer has been compelled to resort to discharges and the union

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[22] It may well be doubted whether union membership requires the furnishing of supplies to enable law violators to pour sulphuric acid on law enforcement officers. The deliberate purpose of the aiders and abetters cannot be questioned (R. 465, 711, 681, 1785). Several of them were in court at the time the injunction was issued and all knew of its existence (R. 679, 710, 785).

[23] New York Times, April 3, 1937.

has agreed to that effective method.[24] This and other similar experiences throughout the country contradict the Board's confidence that collective bargaining will eliminate the sit-down strike. Significant in this connection is the computation by the Department of Labor that 46.6% of the sit-down strikes of 1937 had nothing whatever to do with union organization matters but involved wage, hour and similar disputes in which the principle of collective bargaining was recognized. 47 Monthly Labor Review, 361-2 (August, 1938).

Nor can it be said that the decisions of this Court sustaining the validity of the Act with respect to production employees put an end to sit-downs as a notable factor in industrial relations. In important plants throughout the country, where *bona fide* collective bargaining is in force, the sit-down weapon continues to be used to resolve normal labor disputes.[25] By its very form, the sit-down strike

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[24] The situation had become so intolerable that the union was compelled to enter into a formal agreement providing that in the case of unauthorized strikes or stoppages—the most effective of which had been sit-downs—"the company will discharge or otherwise discipline the employe or employes known to be or found guilty thereof." Labor Relations Reports, Sept. 27, 1937, p. 7. Since that agreement the sit-down strikes still continued. See *infra* note 25.

[25] Nov. 1937. 24,791 workers involved in sit-downs in one month. 47 Monthly Labor Review, 361 (August, 1938).

Dec. 1938. Sit-down strike at the Detroit Plymouth Division of Chrysler. New York Times, Dec. 3, 1938.

Dec. 1938. Sit-down strike at the Nash Kelvinator plant in Kenosha, Wisconsin, in which 300 sit-down strikers forced 5,000 into idleness. Chicago Daily News, Dec. 5, 1938.

Nov. 1938. Sit-down strike at the Chevrolet Gear & Axle Division of General Motors in violation of a collective bargaining agreement. New York Times, Nov. 27, 1938. Chicago Daily News, Nov. 26, 1938.

enables a small group to throw the entire plant into idleness. If, in fact, responsible labor leadership is counselling the abandonment of the sit-down weapon, there is no occasion to instill new life into its use by protecting the participants from proper discharge. The guarantee by a federal agency of economic security to workers seizing plants was certainly not contemplated by the Congress as necessary to effectuate the policies of this Act.[26]

2. *The reinstatement of discharged employees guilty of violence and property destruction cannot effectuate the policies of the Act.*

The reinstatement of strikers guilty of extreme violence would demoralize the operation of an employer's business and encourage rather than discourage interruptions of production with the consequent burdens on commerce.

Sept. 1938. Sit-down strike at the Briggs Manufacturing Company plant at Detroit, involving 12,000 men. Chicago Daily News, Sept. 29, 1938.

Sept. 1938. Sit-down strike at the Armour plant in Kansas City, involving 1800 men. Chicago Daily News, Sept. 10, 1938.

May, 1938. Sit-down in the Seaman Body Corporation plant at Milwaukee in which 28 sit-down strikers threw 4,500 employees out of work. Chicago Daily Tribune, May 21, 1938.

May, 1938. Sit-down in Chevrolet Motors parts plant, Bay City, Michigan, throwing 1200 men out of work. New York Times, May 4, 1938.

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[26] The old board (Section 2(11) of the Act), headed by Senator Wagner, the author of the present act, repeatedly held that an employee's violence or lawlessness during a strike was sufficient to bar his reinstatement notwithstanding the employer's unfair labor practice. *In re National Lock Company*, No. 52, decided Feb. 21, 1934; *In re American Stores*, No. 239, decided June 29, 1934; *In re Eagle Rubber Company*, No. 219, decided May 16, 1934.

The Board has itself given recognition to that proposition by denying reinstatement in certain cases. Such denials are cited in its decision here (R. 1967). No standard of permissible conduct is, however, supplied by the Board. By a sketchy and partisan review of the evidence, the Board arrives at the conclusion that the conduct of the sit-down strikers and those aiding and abetting in their lawlessness was not sufficiently reprehensible to deny them reinstatement.

There was no dispute in the testimony as to what occurred. The men whose reinstatement the Board found necessary to accomplish the legislative purposes are admittedly guilty of indefensible coercive activities. The record discloses in respect of these men:

1. The forcible seizure of the plant and the defiant refusal to surrender possession.

2. The open disregard of the injunctional order entered after a full hearing in court.

3. The violent resistance to the Sheriff on two occasions when he sought to enforce the court writs. In both instances sulphuric acid and the heavy tools with which the men worked were freely employed as deadly weapons.

4. The burning and wounding of law enforcement officers by the sit-down strikers' barrage.

5. The wanton destruction of portions of the buildings, tools and inventory and other damage aggregating more than $60,000.00.

These criminal and destructive tactics are dismissed in the Board's brief with the casual statement that there was

no "sabotage" (R. 1967). In this connection, the Circuit Court of Appeals said:

> "It is further suggested by respondent, we suppose by way of mitigating circumstances, that the men were not engaged in sabotage, and that no malicious sabotage of equipment occurred. Both of these findings were made, and we think neither was supported by substantial evidence. Indeed, the contrary was supported by undisputed evidence." (R. 1989).

The Court thus expressly overruled the Board's findings of fact with respect to the quality of the men's conduct which served as the basis for the order of reinstatement. Reinstatement cannot obviate the lawlessness or restore the destroyed property. By taking the law into their own hands, the men have erected an insurmountable obstacle to effectuating the policies of the Act by an attempted restoration of the *status quo*.

Neither the nature of the sit-down strikers' conduct nor the finding by the Circuit Court of Appeals that it was intentional and malicious is contested. Such deliberate lawlessness disqualified the participants as suitable employees. The Respondent had ample grounds for its apprehension that their employment would engender plant disharmony and strife. Its adherence to the discharge rests upon a firm foundation.

True the Board can impose no punishment upon the sit-down strikers. Nor can it, on the pretext of leaving correction to state authorities, close its eyes to the employees' misconduct and freely override the well-deserved discharge. No more unfailing formula for fomenting and intensifying plant demoralization and resort to violence is conceivable.

In exercising its discretion, the Board gave excessive and controlling weight to the fact that the Respondent reemployed certain of the sit-down strikers, ignoring thereby the entire record of violence and property destruction.[27] It did so upon the theory that by reemploying certain of these men the Respondent admitted that *all* sit-down strikers were qualified and that accordingly its argument to the contrary was not put forward in "good faith." (R. 1967). Such inferences have no evidentiary basis; they are completely contradicted by the record. The Respondent's position has never been in doubt; it accepted applications for reemployment only from those believed to have been coerced and intimidated into remaining within the buildings. On February 26, 1937, within a few hours after the sit-down strikers were ousted from the plant, the Respondent's President issued a public statement in which he said:

> "All of the men who participated in the sit-down strike were discharged by the company. It has been the company's consistent belief that more than half of the eighty men who participated in the seizure of the plants were compelled to do so through coercion and intimidation. Applications for reemployment from such men will receive favorable consideration.

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[27] Instructive on such technique is *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 176, where the Court said:

> "Because the discharged drivers admittedly were guilty of infractions of the respondent's rules and regulations the Board has sought to show that these breaches were trifles and that the real reason for the discharges was the union activities of the drivers. It thus ignores or minimizes the violations and bases its order on what is referred to as 'background', which we have shown is not correctly presented or rightly interpreted and therefore not to be relied upon."

> "We cannot condone the defiance of the courts or the resistance with violence to the enforcement of the law. For the men who participated in such unlawful activities, there can be no place in our plant." (R. 1336).

Providing a basis for Respondent's judgment were the escape of a number of men from the barricaded buildings and the campaign of coercion and intimidation which preceded the plant seizure (R. 1765). In conformity with Respondent's announced policy, twelve of the men who had been coerced into remaining in the buildings and who had managed to escape, were rehired (R. 1772-3, 1784, 1159).[28] Twenty-three others likewise believed by the company to be in the category of unwilling or lessor participants, were similarly rehired. Reemployment was preceded in each instance by a new application and an interview with the plant superintendent who obtained assurance that the lawlessness would not be repeated (R. 1239). No conditions as to the Union membership or collective bargaining were imposed in connection with the reemployment (R. 1216, 1282-3).[29]

Of the thirty-five rehired, the board points to four men rehired as having actively participated in the violence (Bd.

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[28] Illustrative of the restraint to which some of the men within the plant were subjected, are the cases of Oseneck, who slipped out of a window (R. 1159, 1167) and Simonson, who was "permitted" to go to the bedside of his sick wife only after the Vice-President and Secretary of Lodge 66 had, through window conversations, assured themselves that he was not deserting (R. 1177-78).

[29] The Board's repeated assertions to the contrary are made without record citation or finding in the Board's decision and are directly contrary to the record facts. Respondent's affirmative evidence was not denied by any of the Board's witnesses testifying on the subject (R. 456, 452-3, 460-1, 542).

Br. 52n). The fact is that the story of what occurred within the buildings was not fully unfolded until the public hearing before the Circuit Court of Lake County and the subsequent hearing before the Trial Examiner three and one-half months after the above quoted statement and the plant superintendent's interviews with the men reemployed. Indeed, dependent as the Respondent was at the time of the reemployment upon the statements of the men themselves, and facing the necessity as it did of immediately remanning its plant, it is a tribute to the Respondent's diligence that only four of the thirty-five reemployed were ultimately shown to have been active in the violence. More than a third of the rehired participants had escaped during the sit-down. Believed by the Respondent to be typical of the unwilling participants in the plant seizure are men like Osenek and Simonson who refrained from violence and protested against the use of acid (R. 1177, 1175, 1162, 1164).[30]

In view of Respondent's public statement that applications for reemployment for those coerced would receive favorable consideration and that there was no place in the plant for the other participants in the lawlessness, it is not surprising that Respondent was able after interviews to rehire most of the men who made application.

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[30] Simonson testified that he protested against the use of acid because "it was marked 'Poison' and I was afraid it would cripple somebody for life" (R. 1177). He also testified that he broke no windows and threw no missiles (R. 1175).

Osenek testified on cross-examination that he threw no acid or other missiles and destroyed no property (R. 1162, 1164).

Even Germer (one of those whose reemployment is mentioned in the Board's Brief, p. 52n to show Respondent's insincerity) testified that he and others hid acid to prevent its being thrown at deputies "on account of injuries to the eyes and skin" (R. 1173).

Those conspicuous in the violence realized it was futile to apply.[31]

Throughout the brief and particularly to demonstrate the propriety of the reinstatement order, counsel for the Board insist that "only those who would surrender their right to bargain through the Union as their representative were permitted to return" (Bd. Br. p. 50). No record citation for that assertion appears anywhere in the Board's brief and indeed, the testimony of every witness on the subject is to the contrary. *Supra,* p. 11n. The testimony of the Board's own witnesses respecting offers of reemployment uniformly disclosed no condition either as to union membership or collective bargaining (R. 456, 452-53, 460-1, 542). The Board dismissed the allegation of discrimination in reemployment and made no finding that either the reemployment or any offer was conditioned in any respect (R. 1969, 1959). Were such conditions imposed, a holding of discrimination would have been made. *In the Matter of Carlisle Lumber Co.,* 2 N. L. R. B. 248, 265-6. The record facts dispose of the Board's contention

[31] There is no record basis for the Board's statement that the Respondent "actively solicited 53 of the sit-down strikers to return" (Bd. Br. p. 50). The Board apparently includes the 35 who voluntarily returned, in many cases without solicitation, as well as those talked to by brothers, apprentices and other unauthorized persons (R. 634, 618, 458, 810-11, 822).

Compensation for the period during which the plant was closed was paid by the respondent upon the theory that most of the employees including those of the subsidiary Vascoloy-Ramet Corporation had been "prevented from making a day's pay by no act of their own" (R. 1333). Announcement of such back pay was enclosed in current pay envelopes of employees and was not inserted as a notice (Bd. Br. p. 51n), but copied as a news item by the local newspapers. It is uncontradicted that the purpose was to compensate those who suffered without fault—not to attract the return of sit-down strikers (R. 1333, 1705).

that in requiring reinstatement of all sit-down strikers the Board's order was merely removing the unlawful conditions set up by the Respondent. There having been no such discriminatory barriers in fact, there are none to be torn down.

Finally, it is urged that only through reinstatement can the employee's "confidence in the procedure of the Act" be restored (Bd. Br. pp. 59-60). In the absence of reinstatement, counsel suggest "the procedure of collective bargaining will continue to be regarded by the employees as one which can be sought only at the risk of their jobs" (Bd. Br. pp. 59-60). Counsel forget that these particular men had no "confidence in the procedure of the Act". Spurning the statutory procedure, they elected instead to take the law into their own hands, and that, it must be conceded, they did "at the risk of their jobs". The sit-down strikers were not discharged for collective bargaining (R. 1989, 1990). Until the sit-down strike, not a single employee was discharged, disciplined or even threatened by reason of union membership or concerted activities (R. 1593, 280, 436, 361). Reinstatement would not restore confidence in the "procedure of the Act", which the men rejected, but rather in the sit-down strike to which they had resorted as a coercive aid to collective bargaining.

B. The reinstatement of persons (1) whose jobs have been abolished, and (2) who are shown to have been inefficient, cannot effectuate the policies of the Act.

The order of reinstatement completely disregards the following uncontested facts fully established upon this record: *first*, that in a *bona fide* reorganization, thirty-nine jobs, some of which had formerly been occupied by sit-down strikers and some by others ordered reinstated, had been

completely abolished; and *second*, that upon grounds of inefficiency, Respondent objected to the reinstatement of seven individuals whose membership in the union was unknown to the Respondent and who had not participated in any union activity.[32]

The factual soundness of that position has never been challenged by the Board. The *bona fide* character of the internal reorganization and the inefficiency of the seven individuals in question are not denied in the Board's decision or findings. The Board dealt with these two groups by directing Respondent to reinstate all of the men and women involved and then to carry out a new internal reorganization, discharging those for whom there were no jobs or who were inefficient (R. 1967-8). All three judges of the Circuit Court of Appeals agreed that the Board was wholly lacking in statutory power to make such an order.

1. *Reinstatement of former occupants of abolished jobs is unwarranted.*

Neither in its decision nor the brief does the Board manifest an understanding of the nature of the reorganization. Here was no mere reduction in the number of employees doing the same work in the same department—three entire departments were eliminated.

Respondent had long recognized that specific economies in its operations could successfully be introduced (R. 1184, *et seq.*). It entertained, however, a natural reluctance to

[32] There is also a miscellaneous group of seven, including a foreman discharged after the strike, three who joined the union after their discharge for inefficiency, and the like (R. 467-8, 1217-25, 1897, 1905, 1283). The facts with record citations with respect to each are set out in the appendix.

disrupt the organization. The interruption in operations resulting from the plant seizure provided an opportune occasion for a comprehensive reexamination and readjustment of the plant. Unnecessary functions and those which could better be performed by independent contractors were discontinued. These and other changes were fully outlined in the evidence (R. 1184-1192). In view of the undisputed evidence, it is an abuse of discretion to order reinstatement of the occupants of the jobs which no longer exist.

Experience over a period of years had demonstrated that a large maintenance department was an expensive luxury (R. 1184). Accordingly, the maintenance department of fifteen men was eliminated and a repair crew consisting only of a millwright, an electrician and two helpers was substituted. Independent contractors have, since the reopening of the plant, been employed for all substantial construction work with a marked reduction in cost (R. 1190). Similarly, the manufacture of standard dies was completely discontinued. By purchasing such dies in quantity from plants especially equipped to produce them in mass production, large savings have been effected (R. 1192). The jobs of two elderly men (74 and 76 years of age, respectively) in the toolroom were combined and taken over by one young man (R. 1297-9).

In the contact point industry, Respondent's principal competitors had for some time employed women in cutting, spinning and grinding work. As a consequence, they enjoyed lower costs and competitive advantages. Many months prior to the sit-down strike, the Respondent had been advised by experts to take steps to meet this competition (R. 1185). Accordingly, upon the reopening of its plant, the Respondent employed women to do the cutting, spinning and grinding work in lieu of sixteen men who had previously performed such functions. Substantial savings resulted not merely from the lower wages paid to

women but because they turned out a better product, reduced waste and eliminated a portion of the inspection and cutting wheel costs (R. 1185-90; 1830). Notwithstanding the inexperience of the women in the initial months, savings approximating fifty per cent were disclosed (R. 1185-90, 1830). The women's work has been of such high caliber as to establish improved standards and make unnecessary the replacement of two contact inspectors who failed to return and have now been ordered reinstated (R. 1291).

In restoring the *status quo*, the Board may only remedy that injury worked by the unfair labor practices of the employer. It has no power to nullify the changes effected by normal management action or economic forces. As Judge Hutcheson pointed out in *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509, 514 (C. C. A. 5th), "the Board has no authority to order the employment of three men for two jobs." In accord is *Black Diamond S. S. Corp* v. *National Labor Relations Board*, 94 F. (2d) 875, 878 (C. C. A. 2nd), *cert. den.* 304 U. S. 579. In the Court below, Judge Treanor joined with the majority in setting aside this portion of the Board's order, saying:

> ". . . there is no provision in the Act which purports to qualify the right of an employer to abolish unnecessary jobs either during the pendency of a labor dispute or after the commission of an unfair labor practice by an employer. In short, the National Labor Relations Act . . . does not protect striking employees from disadvantages which result from normal management action taken by the employer during the time the striking employees voluntarily refuse to work." (R. 1998).

The explanation offered by the Board is that the order is designed to spread the work fairly between those who remained at work and those who went on strike. No attention is paid to the fact that there was no mere contrac-

tion of work. It was not a case of reducing the number of people doing the same work. In respect of at least thirty-five of the thirty-nine jobs abolished, the functions of those jobs are today nowhere performed by the Respondent. The order of reinstatement of the former occupants of these abolished jobs would compel a perfectly futile act, produce confusion and further industrial strife and doubtless additional proceedings before the Board. The record is complete on this subject and the entire question should have been disposed of by the Board in its order.

None of the authorities cited by the Board deal with the problem of reinstatement of persons whose jobs were abolished, nor do they sustain the present form of order. The crux of *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333, appears in the following language of the opinion (at 347):

> "The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men * * * it [the employer] might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike, but it is found that the preparation and use of the list, and the action taken by the Respondent, were with the purpose to discriminate against those most active in the union."

That decision rests not on the availability of jobs but on the discrimination in reinstatement. In our case the allegations of discriminatory discharge and discriminatory reinstatement were dismissed by the Board.[33]

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[33] Also cited by the Board is *National Labor Relations Board* v. *Hopwood Retinning Co. Inc.*, 98 F. (2d) 97 (C. C. A. 2d). While the form of order is there substantially similar to the one in the present case, there was no issue involving abolished jobs or the reinstatement of persons for whom there was no work. The subject is not even mentioned in the opinion of the Court.

2. *The order of reinstatement of the employees shown to be inefficient was improper.*

In connection with the internal organization, Respondent abolished piece rates which had prevailed in some departments and established an hourly basis of compensation throughout the plant (R. 1189, 1260). At the same time, the foremen were requested to reconsider the efficiency of all employees in order that a properly functioning plant might be reopened (R. 1189, 1213, 1260, 1280). Upon the basis of recommendations of the respective foremen, the Respondent objected to the reinstatement of seven employees upon the ground that they were inefficient (R. 1261-2, 1280-2). Ample evidence of the inefficiency was introduced not only by testimony of the supervisory employees, but by production records as well.[34] Nor was it disputed that this group took no part either in the sit-down strike and picketing or in any other Union activity (R. 763-4, 766-7, 783, 821, 772, 1057). Equally clear is the fact that neither the Respondent nor any member of the management knew

[34] For example: Joan Bissonette's work was 25 to 50 per cent below the average (R. 1270, 1276-7). Her successor, an apprentice, did 40 per cent more work (R. 1292).

Fern Gartley's production rate was 40 per cent below the high and 25 per cent below the average, and 50 to 65 per cent below the production rate on the same job after the reopening of the plant (R. 1270, 1274-6).

Marguerite Seifert's production rate was 10 to 15 per cent below the average and a much larger per cent below the rate achieved upon the reopening of the plant (R. 1269, 1276).

Vivian Johnson's production rate on half of her work was 40 per cent below the average (R. 1270, 1273-4).

The work of the other three, Gramer, Fellens, and Hoff, did not lend itself to production records, but their supervisors testified to their inefficiency (R. 1261-2, 1298-9, 1897).

that these people were members of Lodge 66—indeed, the same supervisors testified that many of those returning to their departments were members of Lodge 66 (R. 1262, 1282-5, 779, 821, 1048).

These facts are not questioned in the Board's decision. The Board announced that it would not "concern" itself with the matter and, after reinstatement of these people, the Respondent could discharge such of them as efficiency considerations required. All of the evidence was in the record and it was incumbent upon the Board to make specific findings—the speculations of counsel (Bd. Br. p. 63) do not provide an adequate substitute.[35] To reinstate and then discharge can certainly not promote plant harmony or in any way facilitate collective bargaining. This Court has stated clearly that strikers may be refused reinstatement "on the ground of skill or ability". *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 303, 347.

A reading of the Act reveals that it

> "was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. * * * It did not authorize the Board to absolve employees from compliance with reasonable rules and regulations for their government and guidance. The Act does not vest in the Board managerial authority." *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 177.

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[35] Although the Board's findings do not challenge the inefficiency of this group, counsel seek to raise some doubt by showing that all received pay raises shortly before the strike (Bd. Br. p. 63). What they neglected to add was that these were part of a general plant-wide raise given to everyone without regard to individual efficiency (R. 770-1, 439).

C. There is no statutory authority for the back pay provisions of the Board's order.

The Board found that the individuals named in the complaint had never made application for reinstatement or reemployment (R. 1962). The Board's order directs that in the event such application be made in the future, it should be honored by the Respondent. To induce compliance and discourage appeal to the Courts, the order further provides that if the application be made and denied, back pay shall accumulate. By this device, the Board has actually proposed a penalty for seeking judicial review of its order. That it is powerless to do. In *Meyers* v. *Bethlehem Ship Building Corp., Ltd.*, 303 U. S. 41, 48, this Court emphasized the Board's lack of authority to apply any sanctions, saying:

> "The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it."

The present back pay provision is entirely different from the normal provision approved in the authorities cited by the Board. The normal purpose of a back pay order is to remedy an employer's refusal to reinstate, but here the Board found there had been no application for reinstatement. Any refusal thereafter, was, in effect, nothing more

than a failure to comply with the Board's order. Moreover, with respect to the persons whose jobs had been abolished or who were shown to be inefficient, the Board's order proposes that upon application, these people be reinstated and immediately thereafter may be discharged. Had the Respondent complied with that order by reinstating the persons whose jobs were abolished or were inefficient and then exercised its unquestioned right immediately to discharge them, not a single penny of back pay would have accrued. Having elected, however, to avoid the confusion and demoralization of its personnel and to appeal the order to the courts, it is subjected to a rapidly mounting monetary risk. A more effective discouragement of resort to judicial protection can scarcely be conceived.

III.

Lodge 66 does not represent a majority of the employees in the appropriate unit and both the negative and affirmative provisions of the order requiring its recognition are invalid.

Upon the premise that Lodge 66 represented a majority of the employees on February 17, 1937, the Respondent is now ordered to recognize that union as the exclusive bargaining representative of all of its employees. While the Board's brief treats separately the cease and desist and the affirmative provisions of the order, both must stand or fall together. There is clearly no distinction between the injunction to cease and desist from refusing to recognize Lodge 66 and the mandatory direction to recognize Lodge 66.

The Court below held that the elimination from the rolls of the dismissed employees had completely dissipated

any majority that Lodge 66 might have enjoyed on February 17th. The opinion states:

> "This being true, the occupants of the building who were discharged on February 17 were no longer employees of the petitioner, and none of them sustained that relationship again until they were reemployed. Hence there was no longer a majority of petitioner's employees who were members of that union, and the finding to the contrary is not supported by any evidence.
>
> "It is urged by the Board that the commission of a crime by strikers does not preclude their right to bargain with petitioner. This we admit, provided they still are employees and represent a majority of all. What we hold is that there was just cause for discharge, it was exercised, and those who have not been re-employed are not employees and were not at the time of the finding and order of the Board. The present employees still have their rights of bargaining without interference of the petitioner, and these may be enforced upon proper procedure" (R. 1989).

The "proper procedure" suggested by the Court is obviously an election reflecting the current desires of the present employees rather than those expressed more than two years ago, principally by men who have ceased being employees.

The explanation offered by the Board for its order is that a majority having been established on February 17th, Lodge 66 must continue to enjoy a "presumptive authority" to render the Act "workable." Cited for that view is *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862, 869 (C. C. A. 2d). In that case there was no evidence of loss of membership—merely

the lapse of a long period of time. It was upon that basis that the Second Circuit Court of Appeals said:

> "However, that was nearly two years ago, and it is possible that the Joint Board will no longer represent a majority of the men, even after those who struck are restored to their jobs, as later sections of the order provide. *The membership of a union is constantly changing, and it may at any time cease to represent the majority;* if it does, it loses its power to bargain for the unit." (Italics supplied.)

The loss of a majority having been affirmatively established in this case, the Court properly rejected any presumptions and gave effect to the record facts. Cf. *In the Matter of Benjamin Fainblatt*, 4 N. L. R. B. 596, 600-601.

The Board counters with a statement that if, in fact, Lodge 66 represents less than a majority today, "that result is directly attributable to Respondent's violations of the Act" (Bd. Br. p. 70). It is a complete answer that, had the men employed either of the lawful means at their disposal, namely, a peaceful strike or a proceeding before the Board, there would have been no discharge and the union's majority would have remained unimpaired. Responsibility for loss of majority must rest squarely upon the men.

The entire defense of the cease and desist provisions relating to recognition—as distinguished from the affirmative order of recognition—rests upon a misapprehension of the terms of the Board's own order. In Section 1(c) Respondent is ordered to

> "(1) cease and desist from • • •
>
> (c) refusing to bargain collectively with Amalgamated Association of Iron, Steel & Tin Work-

> ers of North America, Lodge 66, as the exclusive representative of its hourly paid employees . . . " (R. 1970)

In Section 2(a) the Respondent is ordered to take the following affirmative action:

> "(a) upon request bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of its hourly paid employees . . . " (R. 1970)

Although there is no difference between these provisions, the Board contends that the cease and desist section must be enforced notwithstanding the loss, by Lodge 66, of its majority. The point is made that from a refusal to bargain with Lodge 66 on February 17, a cease and desist order must follow as a matter of course. That position, were it taken in connection with a general order to cease and desist from violating section 8(5) of the Act, would be understandable. But this is not the order in this case. Although couched in cease and desist language, it affirmatively commands the Respondent to recognize Lodge 66 as the exclusive bargaining agency. For such command, there is no authority in the absence of a present majority.

The distinction between negative and affirmative orders is more than formal. A cease and desist order issues upon proof of an unfair labor practice. Affirmative action, however, may be ordered by the Board only when it serves to effectuate the policies of the Act. Section 10 (c). The Board cannot escape the statutory limitation upon an affirmative order, by casting in the mold of a cease and desist order, a mandatory instruction to take affirmative action. But that is precisely what the Board has done in this case. Section 1 (c) of the Board's order (the cease

and desist provision) is identical with section 2 (a) (the affirmative provision). The Court below clearly could not strike the one without eliminating the other. Phrased as they are, and even assuming a refusal to bargain on February 17, 1937, both require for their validity, a present majority.

IV.

The order to cease and desist from violation of Section 8(2) and the order of disestablishment of Rare Metal Workers of America Local No. 1 are not supported by the evidence.

The independent union, Rare Metal Workers of America, is denounced by the Board as an instrumentality of the employer. The decision contains a general finding that Respondent has "dominated, and interfered with the formation and administration of the R. M. W. A. and has contributed support to it" (R. 1965). The record is wholly barren of any evidence to sustain the finding of domination and interference and there is no substantial evidence of support.

The evidence upon which the Board expressly rested its finding was as follows:

> (1) Failing in their efforts to obtain a public hall, the organization committee requested and was permitted the use of vacant space in a deserted company building just outside the plant grounds for the initial organization meetings. The inability to obtain outside halls was due to the feeling in the community and fear of violence on the part of the hall owners (R. 977, 979).
>
> (2) The committee was permitted to mimeograph its initial meeting notices and bulletins on company mimeograph machines, and post the notices on bulletin boards on two occasions.

(3) During a lunch hour ballot boxes for the election of officers were set up in building lobbies, members of the union voted on their own time and the union was given leave to store the ballots in the company's vault.

The undisputed evidence to which the Board gave no weight whatever, included the following:

(1) No member of the supervisory staff played any part in the organization or conduct of the Union (R. 921, 1018, 1020-22). The uncontradicted testimony that there was no interference or control by the management (R. 1320, 1325, 1326).

(2) The formation of a shop union had been the subject of general discussion among the workers (R. 1020). While some expressed a preference for affiliation with the American Federation of Labor (R. 1021), a majority determined to establish an independent Union, voting by secret ballot at their own meeting which no member of the management attended (R. 921, 932-3, 965, 1008, 1011).

(3) Every expenditure for the union's benefit (including the costs of the corporate charter, payment for meeting halls, and the like) was accounted for from its own funds obtained from dues; it received no financial support from the Respondent (R. 1320, 1851-55).

(4) The men retained as their own counsel the "family lawyer" of the temporary president, and he prepared the original membership petitions (R. 937-8).[36]

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[36] Contrary to the record, the Board's Brief suggests that the attorney "did not charge for his services", drawing an improper inference therefrom (Bd. Br. p. 75). The testimony showed that the union expected to pay for the attorney's services, but that he was waiting to complete the work before submitting a bill (R. 938).

(5) The workers drafted their by-laws entirely themselves (R. 1029).[37]

(6) The Union acted promptly to elect officers and trustees who immediately entered upon bargaining negotiations (R. 1002).[38]

(7) Although the production employees voted overwhelmingly to establish the independent union, recognition was not accorded until six weeks thereafter—and then only after two demands and proof of a majority (R. 1002-5).

(8) No members were solicited or dues collected during working hours. Everything in connection with the organization of the Union was done on the workers' own time (R. 958, 918, 942).

(9) The management exerted no influence or coercion, directly or indirectly, to swell the Union's rolls (R. 920, 921, 955-7, 985, 988-90, 1018, 1020). Employees who refused to join were not threatened, disciplined, discharged, or even approached by any member of the supervisory staff (R. 985-6, 990).

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[37] From the fact that the by-laws require a 75 per cent vote to call a strike or affiliate with a national organization, the Board again draws an inference of employer domination. The requirement of a large majority for extraordinary action is common both in unions and other organizations. United Automobile Workers of America requires a two-thirds vote of local members and approval by the international officers for any strike (New York Times, May 11, 1938, p. 3). In any event, that fact is clearly irrelevant, since the Respondent had no part in the preparation of these by-laws (R. 1029).

[38] The Board's Brief suggests that the president was a strike-breaker, hired from the National Metal Trades Association (Bd. Br. p. 76). The Board's decision makes no such finding. The permanent president, Griffith, was one of the old employees (R. 927).

These facts are drawn from the mouths of the Board's own witnesses. With its unlimited powers of subpoena and investigation, the Board was unable to produce a single witness to testify that his adherence to the Union had been in any way contrary to his own free will. *Not a single instance of interference or domination is cited in the Board's decision and there is none in the evidence.* Counsel for the Board have deliberately disregarded both the findings of the Board and the record, in the following gratuitous statements:

> "The R.M.W.A. has obtained its members and its conduct has been directed by respondent's influence. Its policies, and its officers, have been shaped by respondent's influence and with a view to respondent's approval" (Bd. Br. 82).

No such finding was ever made by the Board and all of the evidence, principally adduced from the Board's own witnesses, is specifically to the contrary (R. 920, 921, 955-7, 985-6, 987, 990, 1018, 1020, 1320, 1325, 1326). These wishful conclusions of counsel reveal precisely the type of evidence necessary to sustain the Board's order and conspicuously lacking. We are not concerned with a mere conflict of evidence; the record is barren of any. The order has no "basis in evidence, having rational probative force." *Consolidated Edison Company* v. *National Labor Relations Board*, Nos. 19 and 25, decided Dec. 5, 1938.

To meet the lack of substantial evidence, the Board relies upon the fact that the independent union did not experience the same resistance that confronted Lodge 66. From an absence of hostility or mere passivity on the part of the Respondent, the Board infers that it dominated,

interfered and supported.[39] It is clear that the findings of interference and domination require more affirmative evidence. It must be of such a nature as to corrupt or override the will of the employees. Controlling on this subject is this Court's opinion in *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 568:

> "* * * The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis. Virginia* v. *Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse

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[39] The failure to extend the privilege of the bulletin board to Lodge 66 in the summer of 1936 is criticized as hostility, and the granting of the identical privilege to the Rare Metal Workers of America in the spring of 1937 is condemned as domination (R. 1965).

If, in fact, there was a change in the Respondent's attitude from the summer of 1936 to the spring of 1937, that would be perfectly natural. This Court had changed the prevailing constitutional opinion as to the applicability of the Act, theretofore expressed by the Circuit Courts of Appeal and admittedly entertained by the Respondent (R. 258). The Board was unable to point to any contemporary discrimination between "inside" and "outside" unions; sixty-one members of Lodge 66, including officers and members of the bargaining committee, were unconditionally reinstated or reemployed (R. 1339; 1212-13).

> of relation or opportunity so as to *corrupt or override the will,* and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates." (Italics supplied.)

The lack of opposition to the inception and formation of the independent union can under no circumstances be characterized as "pressure" or "the abuse of relation or opportunity so as to corrupt or override the will."

Referring to evidence of support similar to that here relied upon by the Board, the Court of Appeals for the Second Circuit held, in *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board,* 98 F. (2d) 758, 760, that the Court is not "bound to accept findings based upon evidence which merely creates a suspicion or gives rise to an inference that cannot reasonably be accepted." In that case petitions for an independent union were distributed throughout the plant on company time. The organization meeting of the independent union was held during working hours and employees were paid for the time of attendance. In reversing the Board's finding of domination, interference and support, the Court said (at page 761):

> "This is not the case of a 'company union' whose formation was initiated by the employer in order to combat the efforts of an outside union to organize his employees. The testimony is uncontradicted that the officers of the petitioner had no hand in establishing the Association. It is true, as the Board found, that

> the chief reason for its formation was to keep out the CIO, but the plan of an 'inside' union was apparently the spontaneous reaction of a group of the employees, who circulated their petitions, got up their own meetings, engaged their own attorney to draft the constitution and by-laws, and paid their expenses, without suggestion or help by the petitioner. Concededly the petitioner made no financial contributions. * * *"

That authority fortifies the conclusion that in the slender threads of "support" there is no substantial evidence that the employees' freedom of choice was corrupted or destroyed.

The Board's assertion that the findings of domination, interference and support had been sustained by the Court below is incorrect (Bd. Br. p. 73). The opinion found that there was substantial evidence "to support the finding that petitioner contributed support to the organization of Rare Metal Workers of America, Local No. 1 in violation of the literal interpretation of section 8 (2)." The Board's finding of domination and interference are nowhere sustained in the Court's opinion. As to support, the evidence is too scant to warrant even the Court's qualified approval.

The drastic remedy of disestablishment prescribed in the Board's order is defended as "the necessary concomitant" of the requirement that the Respondent bargain with Lodge 66 as the exclusive representative of its employees. As we have already seen, the latter portion of the order imposes upon the employees a bargaining agency they did not select. After noting the loss by Lodge 66 of its majority through valid discharge and defection, the Court below pointed out:

> "The present employees still have their rights of bargaining without interference of the petitioner, and these may be enforced upon *proper* procedure." (Italics supplied.) (R. 1989)

That "proper procedure" would be an election conducted by the Board. If there were any basis for the Board's findings, the withdrawal of recognition would be a sufficient and appropriate remedy. The disestablishment restrains the employees from any possibility of selecting their own creature as their bargaining representative.

In *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 870, the Second Circuit Court of Appeals struck the disestablishment provision from the order, saying:

> "The section concludes, however, with the words: 'and completely disestablish those associations as such representatives.' This apparently was taken from the order of the district court in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; we cannot see that it adds anything to what precedes, and it certainly did not receive the approval of the Supreme Court; the order was indeed affirmed, but this language was not in question. It appears to us not only redundant, but to carry a charge of disapproval which the act does not warrant. It is to be remembered that the order is to be posted in all the plants, and upon the minds of laymen the addendum is quite likely to impress an unfair stigma on these unions."

National Labor Relations Board v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, and *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, are, on their facts, wholly dissimilar from the present

situation. Indeed, in the latter case this Court distinguishes, even with respect to withdrawal of recognition, between an organization structurally incapable of independent action and one which, regardless of its origin, provides an unfettered vehicle for free collective action by employees. The words of the Court were (at page 270):

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under § 9 (c), even though it had ordered the employer to cease unfair labor practices. But here respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by § 7: and amendment could not be had without the employer's approval."

Rare Metal Workers of America, Local No. 1, is fully capable of functioning and has consistently functioned without the support or consent of the employer. Not one of the characteristics condemned by this Court stigmatizes the union in this case. The evidence shows that the organization was formed only after a secret vote of the workers and then was voluntarily selected by a majority without the slightest coercion or influence of the Respondent. The workers alone have directed its affairs. Neither the Board's finding nor its order have substantial support in the record.

V.

The discriminatory refusal of subpoenas denied to Respondent the fair hearing required by the Fifth Amendment.

The record contradicts the statement in the Board's opinion that "full opportunity to be heard, to examine and to cross-examine witnesses and to produce evidence bearing upon the issues was afforded to all parties." Not a single subpoena requested by the Respondent was granted either before or during the eighteen-day hearing. Not a single subpoena desired by the Board's attorney was refused. He was provided with an unlimited supply of subpoenas signed in blank (R. 1554-5). Immediately after the service of the Complaint, Respondent filed with the Board a formal application for subpoenas, specifying their purpose and complying with the rules (R. 83). A ruling on the application was delayed by the Board until the middle of the hearing, when it ordered a blanket denial of all subpoenas applied for. At least eight times during the long hearing, Respondent renewed, but in vain, its request for subpoenas (R. 121-2; 227-9; 293-5; 309; 1043-4; 1334-7; 1359-60; 1542-3). The denial to Respondent of an opportunity to compel the attendance of witnesses and the production of evidence manifested an extreme partisanship and discrimination, as well as an arbitrary abuse of discretion.

Of basic importance to the Board's case was the number of *bona fide* members Lodge 66 had on February 17 and the appropriate bargaining unit. Upon both of these subjects written records were available but were

never introduced by the Board.[40] But witnesses were permitted to testify from day to day wholly from memory (R. 181, 186, 221-3, 1375-7). Admitted in evidence as proof of date of membership was an exhibit privately prepared by a witness out of the hearing, from the very dues records for which subpoenas were refused (R. 1374-7, 1392-3). Protests against such secondary evidence and unwarranted hearsay were overruled by the Trial Examiner (R. 227-9). Indeed, the Trial Examiner went so far as to discourage the voluntary production of the original writings (R. 235-6).

As the oral testimony came in, counsel for the Respondent pointed out to the Trial Examiner:

> "It is impossible for counsel to question this witness and to check him as to the accuracy of his statements, and [that] the failure of the Board to issue the subpoena and of the Lodge to produce those records is highly prejudicial • • •" (Rec. 294).

The response and ruling of the Trial Examiner was:

> "These documents could be lying there on the table now, and you would have no right to look at them unless Mr. Walsh [the Board's attorney] was willing to

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[40] The Board finally offered in evidence unidentified application cards (R. 309-11, 1063) which admittedly did not constitute the official membership records of Lodge 66 (R. 1384-5, 1063, 1861).

The suggestion in the Board's brief that Respondent stipulated to the number of members on February 17 is erroneous (Bd. Br. p. 34). Respondent only admitted that the names—not the signatures appearing on most of the application cards, coincided with those on the payroll (R. 311). See also Board's brief, page 89.

> let you look at them because you cannot call witnesses or introduce documents until it is your time to put in your case. • • • If you did have and examined him with reference to them, it would be beyond the scope of the direct examination • • • The witness on direct examination has not introduced the exhibits. Manifestly counsel on cross-examination cannot examine on exhibits until they become part of the testimony" (R. 295).

Respondent completed its case and still no subpoenas were forthcoming. The Board called thirteen witnesses on rebuttal (R. 1361-1514). The Respondent called two witnesses on surrebuttal and then rested conditionally (R. 1515-1543). Whereupon, the Board rejoined with an additional witness (R. 1543). One and one-half hours after the Trial Examiner declared the hearing "closed", the session was reconvened on the Trial Examiner's motion. Announcement was made that the Board had issued a subpoena for membership books, but had excluded records relating to the *bona fide* character of the membership and the eligibility rules relied upon in determining the appropriate unit (R. 1555). The subpoena so grudgingly granted came from the attorney for the Board who filled in one of the signed blanks he had carried throughout the trial (R. 1554). If the Respondent was entitled to subpoenas —and the Board finally thought so—it should have had them with sufficient scope and in apt time for proper cross-examination. The limited subpoenas granted after the long trial had been so completely terminated were of no value and were properly rejected.

A motion to adduce additional testimony could not provide an adequate remedy. Unlike *Consolidated Edison Company* v. *National Labor Relations Board*, Nos. 19 and 25, decided Dec. 5, 1938, we are not concerned merely with

a refusal to receive evidence. This Respondent was denied the opportunity to break down, on cross-examination, the secondary evidence which the Board was introducing. Witness after witness testified orally on matters contained in the very documents for which subpoenas were denied and which were essential for adequate cross-examination. The prejudice resulting could not be cured by a mere acceptance of the records in evidence after the termination of the trial. There would be no explanation of their conflict with the oral testimony. By themselves the records were merely additional evidence; on cross-examination they could vitiate the oral testimony and likewise impeach the general credibility of the witnesses. This was particularly damaging since the weight of the evidence may not be judicially reviewed. When to the arbitrary denial is added the discrimination in favor of the prosecution, the conduct of the hearing does violence to every attribute of fair play and "to that sense of fairness which is almost instinctive." *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 Fed. 468, 471 (C. C. A. 2d).

We cannot now speculate on what the records would have disclosed or how effective they would have been in impeaching the secondary evidence produced by the Board. It is entirely possible that the credibility of the several witnesses would have been so shaken as to warrant a disregard of their testimony on other issues. Nor can we conceive of a fair hearing in which the accused is denied an opportunity to cross-examine and to produce evidence simply because the prosecution has supplied what it deems sufficient on the subject (*Cf.* Bd. Br. 91).

The Board has been vested with the dual powers of prosecutor and judge. Simultaneous performance of these two functions carries with it the moral and social responsibility of scrupulous observance of those principles

universally applied to the concept of fair hearing.[41] This Court has vigilantly guarded against the invasion of the due process principle by administrative bodies. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 24. In defining a "full hearing" before an administrative body, this Court, in *Oregon Railroad and Navigation Company* v. *Fairchild, et al.*, 224 U. S. 510, 525, noted the following outstanding features:

> "* * * The defendant was given the benefit of compulsory process to secure and present evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the Commission and the privilege of offering evidence on every matter material to the investigation."

Directly applicable is the rule applied in *Morgan* v. *United States*, 304 U. S. 1, 14, 22:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of

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[41] The Board's whole attitude on subpoenas for the Respondent was one of "expediency" rather than "fair play" as disclosed in a letter from the Trial Examiner to the Secretary of the Board, reading in part:

> "Generally speaking, the issuance of these subpoenas would certainly do no harm to any party concerned and would simply involve the taking of some additional testimony. I suspect that if the subpoenas are not granted, the Respondent will continually raise a great fuss about them as they have already done throughout the hearing. For this reason it may be expedient to issue the subpoenas." (R. 1566.)

their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Conclusion.

The decision of the Circuit Court of Appeals conforms strictly both to the statute and the decisions of this Court. It should be affirmed.

Respectfully submitted,

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APPENDIX.

Analysis and Classification of Persons Ordered Reinstated.

1. The men named below participated in the seizure and retention of the plant from February 17 to February 26, 1937.

   A. The following actually occupied the plant and were discharged for its retention (R. 1783-4, 1738-61, 1800):

- * Joseph Aigner
- * Andrew M. Anderson
- † Steve Ark
- Nick Benkovich
- † Roy Brown
- *†Edward Brunke
- *†Al. Bunton
- *†Jerome Camernik, Jr.
- † Gus Canelakes
- * Ted Christianson
- † Joseph Chudy
- *†Lester Crump
- John Cudith, Jr.
- * Leo P. Daluga
- *†Vincent Dietmeyer
- *†Clarence Dreyer
- *†Harold Dreyer
- *†Raymond E. DuBois
- † Herman Latz
- * Eric Lindberg
- Steve Luczo
- * Elmer Luke
- Nate Mogel
- * Frank Moxey
- † Frank Musech
- † Antone Nagode
- *†David Nostell
- * Theodore Ohlson
- † Elsworth Peters
- * Joseph Petraitis
- * John Praski
- † Merrit Pratt
- † Robert Pratt
- † Joseph Richveis
- † Andrew Rode
- † Alvar Rommppaine

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*These persons formerly occupied positions which have been abolished (R. 1829, 1831).

†These persons were convicted of contempt and sentenced to jail (R. 1738-1761).

* Charles E. Fulkerson, Sr.	† Arvo Rommppaine
† Angelo Galbavy	Ed. Ruck
* Phil Graimer	* Frank Scheuer
*†Stanley Grum	* Edward Schuman
* Eugene D. Hendee	† Peter Skarbalus
Fred Hensley	† Luther Small
* Victor Hertel	George W. Smith
*†Art Holm, Jr.	*†Carl A. Swanson
John W. Jackoway	*†Charles Warner
* Oscar Johnson	Victor Weatherhead
† George Kallio	* Paul Wells
† Tony Kancilja	Allen White
† Edward Kaucic	*†Fred Yaeger
† John Kondrath	† Frank Zelenick
† Frank Latz	

*These persons formerly occupied positions which have been abolished (R. 1829, 1831).

†These persons were convicted of contempt and sentenced to jail (R. 1738-1761).

B. It was stipulated that the following persons, with full knowledge of the Circuit Court injunction, actively aided and abetted the forcible retention of the buildings, contrary to the injunction (R. 1784-5):

W. D. Crump	*William D. Magness
*Thomas E. Fagan	Paul Makovec
Charles E. Fulkerson, Jr.	George Mondro
Frank Furlan	Bartol Puntarich
John Grom	*Harry Raynor
Otto Latz	John Starovich
Joe Lima	Mike Zelenick

*These persons formerly occupied positions which have been abolished (R. 1829, 1831).

2. The Respondent objected to the reinstatement of the following upon the ground that they were inefficient; no showing of any union activity by any of them was made:

Joan Bissonnette (R. 1270, 1277, 1281, 1285)
Frances Fellens (R. 1261, 1263)
Evelyn Graimer (R. 1261-2)
Fern Gartley (R. 1270, 1274-5, 1281)
*Joseph Hoff (R. 1298-9, 1897)
*Vivienne Johnson (R. 1269-70, 1273-4, 1280)
*Marguerite Seifert (R. 1269, 1276, 1280)

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*These persons formerly occupied positions which have been abolished (R. 1291, 1298-9).

3. The following refused Respondent's affirmative request to return to work without conditions; their places were accordingly filled by others:

Tillie Mesec (R. 1283)

Isabelle Recktenwald (R. 1283)

4. The following did not cease work in connection with the sit-down strike or labor dispute:

Virginia Butterfield

(The Board offered no evidence as to her; a subpoena for her attendance was refused the Respondent. The Trial Examiner recommended that the Complaint be dismissed as to her and no exceptions were filed.) (R. 1905, 1897).

Art Holm, Sr.

(He was a foreman, was not a member of Lodge 66 and did not go on strike (R. 467, 468, 470). He was discharged more than a week subsequent to

the sit-down strike for insubordination and inefficiency, both of which are amply established in the record and not denied by the Board (R. 1217-25, 836-7, 1843-9). His duties are no longer performed by any employee (R. 1217).

Bessie Luczo

(She did not participate in the strike in any way and did not even join the union until after the plant reopened.) (R. 785, 788-90).

Jasper Leskovec

(He was laid off in November, 1936 and was discharged more than a month before the sit-down strike. The Trial Examiner found that the discharge was for proper cause unconnected with union membership or activity and recommended that the Complaint be dismissed as to him; no exceptions were filed.) (R. 1225, 1850).

Jack Taylor

(He was a part time temporary employee (R. 1225-6). He did not join the union until a month after the strike (R. 852). The Trial Examiner found that his discharge was for proper cause unconnected with union membership or activity (R. 1897) and recommended that the Complaint be dismissed as to him; no exceptions were filed (R. 1905).

Note: This miscellaneous group is nowhere considered in the Board's decision or findings. Its order directs reinstatement of "employees who went on strike on February 17, 1937." Whether and to what extent this miscellaneous group is included and the findings of the Trial Examiner not excepted to are overruled, is not indicated in the order or the Board's brief.

P. 8.

SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1938.

National Labor Relations Board, Petitioner, *vs.* Fansteel Metallurgical Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 27, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Circuit Court of Appeals set aside an order of the National Labor Relations Board requiring respondent to desist from labor practices found to be in violation of the National Labor Relations Act and to offer reinstatement to certain discharged employees with back pay. While the other portions of the Board's order are under review, the principal question presented relates to the authority of the Board to require respondent to reinstate employees who were discharged because of their unlawful conduct in seizing respondent's property in what is called a "sit-down strike".

Respondent, Fansteel Metallurgical Corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of products made from rare metals. No question is raised as to the intimate relation of its operations to interstate commerce or the effect upon that commerce of the unfair labor practices with which the corporation is charged. The findings of the Board show that in the summer of 1936 a group of employees organized Lodge 66 under the auspices of a committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America; that respondent employed a "labor spy" to engage in espionage within the Union and his employment was continued until about December 1, 1936; that on September 10, 1936, respondent's superintendent was requested to meet with a committee of the union and the superintendent required that the committee should consist only of employees of five years' standing; that a committee, so constituted, presented a contract relating to working conditions; that the superintendent objected to "closed-shop and check-off provisions" and announced that it was respondent's policy to refuse recognition to

"outside" unions; that on September 21, 1936, the superintendent refused to confer with the committee in which an "outside" organizer had been included; that meanwhile, and later, respondent's representatives sought to have a "company union" set up but the attempt proved abortive; that from November, 1936, to January, 1937, the superintendent required the president of the Union to work in a room adjoining the superintendent's office with the purpose of keeping him away from the other workers; that while in September, 1936, the Union did not have a majority of the production and maintenance employees, an appropriate unit for collective bargaining, by February 17, 1937, 155 of respondent's 229 employees in that unit had joined the Union and had designated it as their collective bargaining representative; that on that date, a committee of the Union met twice with the superintendent who refused to bargain with the Union as to rates of pay, hours and conditions of employment, the refusal being upon the ground that respondent would not deal with an "outside" union.

Shortly after the second meeting in the afternoon of February 17th the Union committee decided upon a "sit-down strike" by taking over and holding two of respondent's "key" buildings. There were thereupon occupied by about 95 employees. Work stopped and the remainder of the plant also ceased operations. Employees who did not desire to participate were permitted to leave, and a number of Union members who were on the night shift and did not arrive for work until after the seizure did not join their fellow members inside the buildings. At about six o'clock in the evening the superintendent, accompanied by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave. They refused and respondent's counsel "thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings". The men continued to occupy the buildings until February 26, 1937. Their fellow members brought them food, blankets, stoves, cigarettes and other supplies.

On February 18th, respondent obtained from the state court an injunction order requiring the men to surrender the premises. The men refused to obey the order and a writ of attachment for contempt was served on February 19th. Upon the men's refusal to submit, a pitched battle ensued and the men successfully resisted the attempt by the sheriff to evict and arrest them. Efforts at mediation on the part of the United States Department of Labor and

the Governor of Illinois proved unavailing. On February 26th the sheriff with an increased force of deputies made a further attempt and this time, after another battle, the men were ousted and placed under arrest. Most of them were eventually fined and given jail sentences for violating the injunction.

Respondent on regaining possession undertook to resume operations and production gradually began. By March 12th the restaffing was approximately complete. A large number of the strikers, including many who had participated in the occupation of the buildings, were individually solicited to return to work with back pay but without recognition of the Union. Some accepted the offer and were reinstated; others refused to return unless there were union recognition and mass reinstatement and were still out at the time of the hearing before the Board. New men were hired to fill the positions of those remaining on strike.

Meanwhile the Union was not inactive. On March 3d and 5th there were requests, which respondent refused, for meetings to consider the recognition of the Union for collective bargaining. There was no collective request for reinstatement of all the strikers. The position of practically all the strikers who did not go back, and who were named in the complaint filed with the Board, was "that they were determined to stay out until the Union reached a settlement with the respondent".

Early in April a labor organization known as Rare Metal Workers of America, Local No. 1, was organized among respondent's employees. There was a meeting in one of respondent's buildings on April 15th, which was attended by about 200 employees and the balloting resulted in a vote of 185 to 15 in favor of the formation of an "independent" organization. Another meeting was held soon after for the election of officers. Respondent accorded these efforts various forms of support. The Board concluded that the Rare Metal Workers of America, Local No. 1, was the result of the respondent's "anti-union campaign" and that respondent had dominated and interfered with its formation and administration.

Upon the basis of these findings and its conclusions of law, the Board made its order directing respondent to desist from interfering with its employees in the exercise ot their right to self-organization and to bargain collectively through representatives of their own chosing as guaranteed in Section 7 of the Act; from dominating or interfering with the formation or administration of the Rare Metal Workers of America, Local No. 1, or any other labor organi-

zation of its employees or contributing support thereto; and from refusing to bargain collectively with the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of the employees described. The Board also ordered the following affirmative action which it was found would "effectuate the policies" of the Act;—that is, upon request, to bargain collectively with the Amalgamated Association as stated above; to offer, upon application, to the employees who went on strike on February 17, 1937, and thereafter, "immediate and full reinstatement to their former positions", with back pay, dismissing, if necessary, all persons hired since that date; to withdraw all recognition from Rare Metal Workers of America, Local No. 1, as a representative of the employees for the purpose of dealing with respondent as to labor questions and to "completely disestablish" that organization as such representative; and to post notices of compliance. 5 N. L. R. B. 930.

The Board found that respondent had not engaged in unfair labor practices by "discrimination in regard to hire or tenure of employment" in order to "encourage or discourage membership in any labor organization", and accordingly the complaint under Section 8(3) of the Act was dismissed. *Id.*

On respondent's petition, the Circuit Court of Appeals set aside the Board's order (98 F. (2d) 375) and this Court granted certiorari. November 21, 1938.

First.—The unfair labor practices. The Board concluded that by "the anti-union statements and actions" of the superintendent on September 10, 1936, and September 21, 1936, by "the campaign to introduce into the plant a company union", by "the isolation of the union president from contact with his fellow employees", and by the employment and use of a "labor spy", respondent had interfered with its employees, and restrained and coerced them, in the exercise of their right to self-organization guaranteed in Section 7 of the Act and thus had engaged in an unfair labor practice under Section 8(1) of the Act.

Owing to the fact that in September, 1936, the Union did not have a majority of the employees in the appropriate unit, the Board held that it was precluded from finding unfair labor practices in refusing to bargain collectively at that time, but the Board found that there was such a refusal on February 17, 1937, when the Union did have a majority of the employees in the appropriate unit, and that this constituted a violation of Section 8(5).

These conclusions are suported by tne findings of the Board and the latter in this relation have substantial support in the evidence.

Second.—The discharge of the employees for illegal conduct in seizing and holding respondent's buildings. The Board does not now contend that there was not a real discharge on February 17th when the men refused to surrender possession. The discharge was clearly proved.

Nor is there any basis for dispute as to the cause of the discharge. Representatives of respondent demanded that the men leave and on their refusal announced that they were discharged "for the seizure and retention of the buildings". The fact that it was a general announcement applicable to all the men in the plant who thus refused to leave does not detract from the effect of the discharge either in fact or in law.

Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit.

This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property.

Third.—The authority of the Board to require the reinstatement of the employees thus discharged. The contentions of the Board in substance are these. (1) That the unfair labor practices of respondent led to the strike and thus furnished ground for requiring the reinstatement of the strikers; (2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct; (3) That the Board was entitled to order reinstatement or reemployment in order to "effectuate the policies" of the Act.

(1) For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self- rganization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent,

there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure would be to create an anomalous distinction for which there is no warrant unless it can be found in the terms of the National Labor Relations Act. We turn to the provisions which the Board invokes.

(2) In construing the Act in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 45, 46, we said that it "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; that the employer "may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion". See, also, *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132. Compare *Texas & New Orleans R. R. Co.* v. *Brotherhood*, 281 U. S. 548, 571; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 559.

It is apparent under that construction of the Act that had there been no strike, and employees had been guilty of unlawful conduct in seizing or committing depredations upon the property of their employer, that conduct would have been good reason for discharge, as discharge on that ground would not be for the purpose of intimidating or coercing employees with respect to their right of self-organization or representation, or because of any lawful union activity, but would rest upon an independent and adequate basis.

But the Board, in exercising its authority under Section 10(c) to reinstate "*employees*", insists that here the status of the employees was continued, despite discharge for unlawful conduct, by virtue of the definition of the term "*employee*" in Section 2(3). By that definition the term includes

"any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, ...".

We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision.

We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra*, p. 33. To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. *Associated Press* v. *National Labor Relations Board, supra.* The conduct thus protected is lawful conduct. Congress also recognized the right to strike,—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Sec-

tion 13 provides that nothing in the Act "shall be construed so as to interfere with or impede or diminish in any way the right to strike". But this recognition of "the right to strike" plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work. As we said in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 347, "if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act". There is thus abundant opportunity for the operation of Section 2(3) without construing it as countenancing lawlessness or as intended to support employees in acts of violence against the employer's property by making it impossible for the employer to terminate the relation upon that independent ground.

Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the Union committee "to take over and hold two of the respondent's 'key' buildings". It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of "the right to strike" to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.

(3) The Board contends that its order is valid under the terms of the Act "regardless of whether the men remained employees". The Board bases its contention on the general authority, conferred by Section 10(c), to require the employer to take such affirmative action as will "effectuate the policies" of the Act. Such action, it is argued, may embrace not only reinstatement of those whose status as employees has been continued by virtue of Section 2(3), but also a requirement of the "reemployment" of those who have ceased to be employed.

The authority to require affirmative action to "effectuate the policies" of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which

the Board invokes. Thus in *Consolidated Edison Company* v. *National Labor Relations Board* (decided December 5, 1938), we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. Elections may be ordered to decide what representatives are desired by the majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

What we have said also meets the point that the question whether reinstatement or reemployment would effectuate the policies of the Act is committed to the decision of the Board in the exercise of its discretion subject only to the limitation that its action may not be "arbitrary, unreasonable or capricious". The Board recognizes that in "many situations" reinstatement or reemployment after

discharge for illegal acts would not be proper, but the Board insists that it was proper in this instance. For the reasons we have given we disagree with that view. We think that a clearer case could hardly be presented and that, whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review.

The Board stresses the fact that, when respondent was able to obtain possession of its buildings and to resume operations, it offered reemployment to many of the men who had participated in the strike. The contention confuses what an employer may voluntarily and legally do in the exercise of his right of selection and what the Board is entitled to compel. In announcing the reopening respondent stated its belief that a large number of men who had taken part in the seizure of the plant were compelled to do so through coercion and intimidation and that applications for reemployment from such men would receive favorable consideration. The Board challenges the statement that respondent limited its rehiring to such applicants. The Board points to evidence showing that everyone who applied for reemployment during the period of restaffing was taken back without condition except two employees who were advanced in years and were not reinstated solely for that reason, and to the testimony of the superintendent that at least thirty-seven were rehired "who had been in the sit-down".

We find it unnecessary to consider in detail the respective contentions as to respondent's offer of reemployment, for we think that its action did not alter the unlawful character of the strike or respondent's rights in that aspect. The important point is that respondent stood absolved by the conduct of those engaged in the "sit-down" from any duty to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemployment if it chose. In so doing it was simply exercising its normal right to select its employees.

Fourth.—The requirement of reinstatement of employees who aided and abetted those who seized and held the buildings. There is a group of fourteen persons in this class who were not within the buildings and hence do not appear to have been within the announcement of discharge, but who went on strike and fall within the order for reinstatement. The Board made no separate findings with respect to these particular persons and refers us to the evidence to show their relation to the transactions under review. This, however, sufficiently appears in the stipulation of facts, to

which the Board was a party, naming in paragraph 12 these fourteen persons and describing their conduct as follows:

"All of the following men were employees of the company on February 17, 1937, but did not participate in the seizure and retention of the building, but aided and abetted the men within the said buildings 3 and 5 in the retention of the said buildings by soliciting, procuring and delivering of food, bedding, cigarettes, stoves, or other supplies, or in some other manner, and thereby assisted the said men in buildings 3 and 5 to remain therein contrary to the injunctional order and writ of injunction heretofore mentioned; that all of the said men named in this paragraph had actual knowledge of the issuance of the said injunctional order and writ of injunction ordering and directing the men in buildings 3 and 5 to vacate the same, and that their activities in aiding and abetting the men in buildings 3 and 5 were done with a view to and for the purpose of assisting the said men to remain in the said buildings after the issuance of the said injunctional order and writ of injunction and with knowledge thereof. None of the men named in this paragraph were discharged by the company on February 17 , 1937, or thereafter, and none of these men were recalled to work by the company upon the resumption of plant operations shortly after February 26th, 1937:" (the names follow)

It cannot be said that independently of the Act respondent was bound to reinstate those who had thus aided and abetted the "sit-down" strikers in defying the court's order. If it be assumed that by virtue of Section 2(3) they still had the status of "employees", that provision did not automatically provide reinstatement. Whether the Board could order it must turn on the application of the provision empowering the Board to require "such affirmative action, including reinstatement of employees" as will "effectuate the policies" of the Act. We are thus returned to the question already discussed and we think that in that respect these aiders and abettors, likewise guilty of unlawful conduct, are in no better case than the "sit-down" strikers themselves. We find no ground for concluding that there is any policy of the Act which justifies the Board in ordering reinstatement in such circumstances.

Fifth.—There are nine other persons apparently embraced within the order of reinstatement as to which respondent interposes special objections. As to seven, respondent objects to the reinstatement upon the ground that they were inefficient and that no showing of union activity by any of them was made. As to two others, respondent contends that they refused its request to return to work without any conditions and that their places were accordingly filled.

With respect to these nine persons, and to a miscellaneous group of five others including three as to whom the trial examiner recommended dismissal of the complaint, the Board has not supplied specific findings upon the points in controversy to sustain its order.

We are of the opinion that the Circuit Court of Appeals did not err in setting aside the requirement of reinstatement.

Sixth.—The requirement that respondent shall bargain collectively with Lodge 66 of the Amalgamated Association as the exclusive representative of the employees in the described unit.

Respondent resumed work about March 12, 1937. The Board's order was made on March 14, 1938. In view of the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining. The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through respresentatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election.

Seventh.—The requirement that respondent shall withdraw all recognition from Rare Metal Workers of America, Local No. 1.

While respondent presents a strong protest, insisting that Local No. 1 of the Rare Metal Workers was the free choice of the employees after work was resumed, we cannot say that there is not substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provision of Section 8(2), and we think that the order of the Board in this respect should be sustained. Whether Rare Metal Workers of America, Local No. 1, or any other organization, is the choice of the majority of the employees in the proper unit can be determined by proceedings open to the Board.

The provisions of the Board's order contained in Paragraph 1, subdivisions (a) and (b), in Paragraph 2, subdivision (d), and in Paragraph 2, subdivisions (e) and (f) so far as these refer to the

first-mentioned provisions, and the final Paragraph of the order dismissing the charge under Section 8(3) of the Act, are sustained. The other provisions of the order are set aside.

The judgment of the Circuit Court of Appeals is modified accordingly and as modified is affirmed.

It is so ordered.

Mr. Justice FRANKFURTER took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1938.

National Labor Relations Board, Petitioner, vs. Fansteel Metallurgical Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 27, 1939.]

Mr. Justice Stone, concurring in part.

I concur in so much of the Court's decision as holds that the Board was without statutory authority to order reinstatement of those employees who were discharged on February 17, 1937. But I rest this conclusion solely on the construction of § 2(3) and § 10(c) of the National Labor Relations Act. By § 10(c) the Board is given authority to reinstate in their employment only those who are "employees". Before the Board made its order, respondent's employees, by reason of their lawful discharge for cause, had lost their status as such, which would otherwise have been preserved to them under § 2(3).

The National Labor Relations Act, as its purpose and scope are disclosed by its preamble and operative provisions and explained by the reports of the Congressional committees recommending its enactment, Report No. 573, Senate Committee on Education and Labor, 74th Cong., 1st Sess.; Report No. 1147, House Committee on Labor, 74th Cong., 1st Sess., is aimed at securing the peaceable settlement of labor disputes by the prevention of unfair labor practices of the employer and by requiring him to bargain collectively with his employees. Since one means adopted by the Act to secure this end is the reinstatement, by the discretionary action of the National Labor Relations Board, of employees when unfair labor practices have caused them to cease work, it was necessary to provide that they should not lose their status as employees by reason of that fact. This was accomplished by § 2(3), which provides:

"The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ."

Having in mind the purposes of the Act and the end sought by the enactment of this section, I think its fair meaning is that attributed to it by the Senate Committee Report, *supra*, pp. 6-7, which declared:

"The bill thus observes the principle that men do not lose their right to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. . . . And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."

But it does not follow because the section preserves this right to employees where they have ceased work by reason of a labor dispute or unfair labor practice, that its language is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason—their discharge for unlawful practices which the Act does not countenance.

There is nothing in the Act, read as a whole, to indicate such a purpose, and there is no language in § 2(3) directed to such an end. I cannot attribute to Congress in the adoption of § 2(3), explained as it was in the Senate Committee Report, a purpose to cut off the right of an employer to discharge employees who have destroyed his factory and to refuse to reemploy them, if that is the real reason for his action. If a plainer indication of such a purpose had been given by the language of § 2(3), I should have thought it of sufficiently dubious constitutionality to require us to construe its language otherwise, if that could reasonably be done, leaving it to Congress to say so, in unmistakable language, if it really meant to impose that duty on the employer.

As to the fourteen employees who aided and abetted the sit-down strike, but who were not discharged, I think they retained their status under § 2(3), and that the Board had power to reinstate them. Whether that power should be exercised was a matter committed to the Board's discretion, not ours.

In other respects I concur with the decision of the Court.

SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1938.

National Labor Relations Board, Petitioner, vs. Fansteel Metallurgical Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 27, 1939.]

Mr. Justice Reed, dissenting in part.

This Court agrees with the conclusion of the Labor Board that the respondent was guilty of unfair labor practices, prior to the strike, in campaigning for a company union, isolating the union president, making, through its superintendent, anti-union statements and employing a labor spy. It also accepts the Board's conclusion that there was further pre-strike violation by respondent of the Labor Relations Act by refusal to bargain collectively. None questions the power of the Board to reinstate striking employees as a means of redress for unfair labor practices. The issue while important is narrow. Can an employee, on strike or let out by an unfair labor practice, be discharged, finally, by an employer so as to be ineligible for reinstatement under the act?

The issue so stated glows feebly apart from the fire of controversy. But it may permit a more objective appraisal than to examine it when illustrated by conduct on the part of the employees which is thought to put "a premium on resort to force" and to subvert "the principles of law and order which lie at the foundations of society." None on either side of the disputed issue need be suspected of "countenancing lawlessness," or of encouraging employees to resort to "violence in defiance of the law of the land." Disapproval of a sit-down does not logically compel the acceptance of the theory that an employer has the power to bar his striking employee from the protection of the Labor Act.

The Labor Act was enacted in an effort to protect interstate commerce from the interruptions of labor disputes. This object was sought through prohibition of certain practices deemed unfair to

labor, and the sanctions adopted to enforce the prohibitions included reinstatement of employees. To assure that the status of strikers was not changed from employees to individuals beyond the protection of the act, the term employee was defined to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . ." § 2(3), Act of July 5, 1935. Without this assurance of the continued protection of the act, the striking employee would be quickly put beyond the pale of its protection by discharge. As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to conduct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act.

The Congress sought by clear language to eliminate this prolific source of ill feeling by the provision just quoted which should be interpreted in accordance with its language as continuing the eligibility of a striker for reinstatement, regardless of conduct by the striker or action by the employer. The constitutional problem involved in such a conclusion is not different from the one involved in compelling an employer to reinstate an employee, discharged for union activity. There is here no protection for unlawful activity. Every punishment which compelled obedience to law still remains in the hands of the peace officers. It is only that the act of ceasing work in a current labor dispute involving unfair labor practices suspends for a period, not now necessary to determine, the right of an employer to terminate the relation. The interference with the normal exercise of the right to discharge extends only to the necessity of protecting the relationship in industrial strife.

The point is made that an employer should not be compelled to reemploy an employee guilty, perhaps, of sabotage. This depends upon circumstances. It is the function of the Board to weigh the charges and countercharges and determine the adjustment most conducive to industrial peace. Courts certainly should not interfere with the normal action of administrative bodies in such circumstances. Here both labor and management had erred grievously in their respective conduct. It cannot be said to be unreasonable to

restore both to their former status. Such restoration would apply to the sit-down strikers and those striking employees who aided and abetted them.

I am of the view that the provisions of the order of the Board ordering an offer of reinstatement to the employees discussed above should be sustained. As the remainder of the order is affected by the determination upon this issue but not wholly controlled by the conclusions, no opinion is expressed as to the other requirements of the order.

Mr. Justice BLACK concurs in this dissent.